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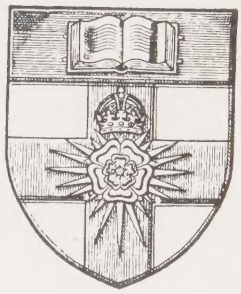

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

JULY 27, 1934, TO MAY 22, 1936.

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE DU PARCQ.

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27 *July*.

Assault—Beating—Gratification of Sexual Perversion—Defence of Consent—How Far Available—Onus of Proof as to Absence of Consent—Omission to Direct Jury—Conviction Quashed.

On a charge of assault consent can never be a defence when the alleged assault consists in an unlawful act, and as a general rule it is an unlawful act to strike another person with such a degree of violence that bodily harm is a probable consequence. To this rule there are a number of well-recognised exceptions, such as blows struck in the course of friendly athletic contests or rough but innocent horseplay, but blows struck for the purpose of gratifying a perverted sexual passion do not come within any of the recognised exceptions to the general rule.

The appellant, in order to gratify a perverted sexual passion, beat a girl with a cane, which left seven or eight red marks on her body. He was charged with indecent assault and common assault and at the trial relied on the defence of consent. The Chairman overruled a submission on behalf of the prosecution that, in the circumstances of the case, consent could not be a defence, and directed the jury on the footing that consent or non-consent was the vital issue, but omitted to direct them that the onus of negativing consent lay on the prosecution.

Held, the jury should have been directed that, if they were satisfied that the blows struck by the appellant were likely or intended to do bodily harm to the prosecutrix, they ought to convict him, irrespective of the question of consent, but that, if they were not so satisfied, they should convict only if they took the view that the prosecution had proved absence of consent on the part of the prosecutrix. In the circumstances of the particular case it was

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impossible to say that facts had been proved which conclusively showed the appellant's act to have been unlawful in itself, and, in view of the misdirection on the issue of consent, the conviction must be quashed.

CONEY (1882), 8 Q. B. D. 534, followed and applied.

Appeal against conviction.

The appellant was convicted at Surrey Quarter Sessions on May 11, 1934, of indecent assault and common assault, and was sentenced by the Chairman to concurrent terms of eighteen months' and six months' imprisonment, in each case with hard labour.

The appellant, who was addicted to a form of sexual perversion, induced a girl aged seventeen to go with him to a garage, and he there beat her with a cane in circumstances of indecency. The beating, which was described by a medical witness as a "fairly severe beating," left seven or eight red marks on the girl's body. At the trial the appellant raised the defence that the girl had consented to everything which he had done. The further facts of the case, so far as they are material to this report, and the relevant passages of the summing-up, appear fully in the judgment.

G. B. McClure, for the appellant:

The trial was in various respects unsatisfactory. The onus of proving that the girl did not consent lay upon the prosecution, but the jury received no clear direction to this effect. [He referred on this point to MAY (8 Cr. App. R. 63; [1912] 3 K. B. 572; HORN (1912), 7 Cr. App. R. 200; BRADLEY (1910), 4 Cr. App. R. 225; and HART (1914), 10 Cr. App. R. 176.] Further, the appellant was subjected throughout the trial to an atmosphere of prejudice. In cross-examination he was asked about other alleged acts of a similar kind by him, on the ground, apparently, that by putting forward the defence of consent he had made an imputation on the character of the prosecutrix.

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[THE LORD CHIEF JUSTICE: I thought it had been held again and again that putting forward a defence of consent does not amount to making an imputation on the character of the prosecutrix.]

That is the accepted view of the law, though there is a decision to the contrary in FISHER (1899), 34 L. J. Newsp. 100.

[SWIFT, J.: How far can there be consent in law to an act of this kind?]

If something in the nature of a duel or prize fight is contemplated there cannot be consent. The whole matter was fully considered in CONEY (1882), 8 Q. B. D. 534, and the effect of that decision appears to be that the only case where consent can be no defence to a charge of assault is where the act done is something which is illegal in itself. There must be something in the nature of a breach of the peace or else the probability of serious injury resulting. The matter must in each case be one of degree, and there is no suggestion that the caning in the present case was dangerous or even very hurtful. In any event the question of degree was one for the jury and, owing to the course which the trial took, they were never asked to decide that question. [SWIFT, J., referred to MATTHEW *v.* OLLERTON, (1693), Comb. 218.] Further, the answer "No" which the Chairman gave to the jury's question after retirement: "If a man has reason to think that consent has been given, does that constitute consent?" was entirely inadequate. They should have been directed to consider the effect of a *bona fide* belief on reasonable grounds on the part of the accused that a state of facts existed which would allow him to commit the assault. Regarding the case as a whole, the verdict was unreasonable and cannot be supported having regard to the evidence.

C. G. L. Du Cann, for the Crown:

Consent is not an available defence in all charges of assault, and it is not available in a case of this character,

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because the act had a tendency to cause a breach of the peace and also was an act likely to produce an injury to the public as well as to the girl herself. In CONEY it was said by Stephen, J., at p. 549: "The consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured." In cases where the application of violence to the person is permitted, the act is one for the benefit either of the person who submits to the violence or of the State, or else the act falls within the category of lawful sport. It was decided in CONEY (*supra*) that leave and licence cannot be given for a succession of blows in a prize fight, and it is submitted that leave and licence cannot be given for a succession of blows in a case like the present, where there are strong public grounds for prohibiting the assault. The answer to the jury's question after they had retired was correct in law, but it is conceded that it would have been better if a fuller answer had been given. It is also conceded that it was nowhere explained in the summing-up that the onus of negativing consent lay on the prosecution, although MAY (*supra*) laid it down that the jury must be so directed.

G. B. McClure replied.

THE LORD CHIEF JUSTICE: We have come to the conclusion that this trial, dealing as it did with a revolting matter, was in various ways unsatisfactory. The Court is compelled, however reluctantly, to take the view that in the circumstances this conviction cannot safely be upheld and that this appeal must be allowed. The matter involves, however, more than one question of importance and we propose, therefore, to give our reasons for our decision upon a later day.

Cur. adv. vult.

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July 27.—The considered judgment of the Court was read by—

SWIFT, J.: In this case the Lord Chief Justice has asked me to read the judgment of the Court.

The appellant was convicted at the Surrey Quarter Sessions upon an indictment charging him with indecent assault and common assault on Norah Eileen Harrison. He was sentenced to eighteen months' imprisonment with hard labour upon the count for indecent assault, and to six months' imprisonment with hard labour upon the count for common assault, the sentences to run concurrently. He was given leave to appeal against conviction. There was no appeal against sentence.

The appellant complained that the Chairman misdirected the jury in the summing-up and in the reply which he gave to a question put to him by the jury, and that the verdict was unreasonable and could not be supported upon the evidence.

It was established by the evidence, and was not in dispute, that on March 8, 1934, in the evening, the appellant induced Norah Eileen Harrison, a girl seventeen years of age, to go with him to a garage at Morden, and that there he beat her with a cane in circumstances of indecency. The defence was that it lay upon the prosecution to prove absence of consent, and that in fact the girl had consented to everything which was done by the appellant.

It is not necessary to narrate the facts in detail. It appeared that the appellant was addicted to a form of sexual perversion, and there was no doubt that during a series of telephone conversations he had made suggestions to the prosecutrix which, if they were taken seriously, meant that he intended or desired to beat her. According to the evidence of the appellant, and of a young woman who said that she had overheard some of the telephone conversations, there was talk between the appellant and the prosecutrix which left no doubt that she had expressed

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her willingness to submit herself to the kind of conduct to which he was addicted. On the evening of March 8 she met him for the first time, and met him, according to her evidence, in the belief that she was to be taken to a place of entertainment—"the pictures." They met by appointment at the Marble Arch. It was common ground that his first remark was, "Where would you like to have your spanking, in Hyde Park, or in my garage?" but the prosecutrix said that she did not treat the question seriously. She went with him, however, on the tube railway to Morden, and then to a garage, either, as she said, because she was compelled or induced by fear to do so, or, as he maintained, willingly and in pursuance of a common design. The garage is described as being in a passage-way between two houses. There the alleged offences were committed.

In addition to the girl herself, three witnesses were called on behalf of the prosecution. A doctor, who had examined her at 9.40 p.m. on March 10, said that there were seven or eight red marks upon her body, and expressed the opinion that these marks indicated that she had suffered a "fairly severe beating." He found no sign of any other injury. A married sister of the prosecutrix deposed that she had returned home just after ten o'clock on the night of the alleged assault looking pale and ill, and had made a complaint which was consistent with her evidence. A detective inspector who arrested the appellant on March 13 proved that he found in the possession of the appellant a sealed envelope, the terms of which left no doubt as to the nature of the practices to which he was addicted.

The appellant gave evidence on his own behalf, asserting that the prosecutrix had so acted throughout as to make it plain that she consented to all that he did. The young woman who has already been mentioned was called, and gave evidence about the telephone conversations to which she had listened. It is enough to say that her evidence, if believed, showed that the prosecutrix went to the garage

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with full knowledge of the appellant's intentions, and without reluctance.

At the close of the case for the defence, and before counsel addressed the jury, the learned counsel for the Crown submitted (in the absence of the jury) that, in the circumstances of the case, it was unnecessary for the prosecution to prove absence of consent. After hearing the argument, the justices ruled against this submission. The jury returned into court, and the Chairman summed up to them upon the footing that the question "consent or no consent" was the vital issue.

If it be assumed that a verdict of guilty could be justified in this case only by proof that there was absence of consent, certain observations may properly be made. First, it was of importance that the jury should be left in no doubt as to the incidence of the burden of proof in relation to consent. In MAY (8 Cr. App. Rep. 63; [1912] 3 K. B., at p. 575) the principle applicable to cases of this kind was laid down by this Court in these words: "The Court is of opinion that if the facts proved in evidence are such that the jury can reasonably find consent, there ought to be a direction by the Judge on that question, both as to the onus of negativing consent being on the prosecution and as to the evidence in the particular case bearing on the question."

We have no doubt that the facts proved in the present case were such that the jury might reasonably have found consent. It is, indeed, difficult to reconcile some of the admitted facts with absence of consent. It was therefore of importance (if consent was in issue) that there should be no possibility of doubt in the minds of the jury upon the question whether it was for the Crown to negative consent, or for the defence to prove it. A second observation which may fairly be made is that consent, being a state of mind, is to be proved or negatived only after a full and careful review of the behaviour of the person who is alleged to

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have consented. Unless a jury is satisfied beyond reasonable doubt that the conduct of the person has been such that, viewed as a whole, it shows that she did not consent, the prisoner is entitled to be acquitted.

It is evident to the Court that the Chairman was at pains to sum up an unusually difficult case with impartiality and precision. We think, nevertheless, that, if the summing-up be looked at in the light of the observations which we have made, it will be seen to be defective in two respects. First, we cannot find that the Chairman ever gave a clear direction to the jury that the onus of negativing consent was on the prosecution. In that part of the summing-up where this aspect of the case is specifically dealt with, the Chairman, after using the words "if there is consent, that is a complete answer," went on to say: "Next you get to this vital question in the case, and that is whether the complainant in this case . . . was, as she alleges, compelled by fear to submit to the defendant's wishes, or whether, as he alleges, there was no compulsion; that is the point. Because if there was no compulsion, if she was not, as she alleges, compelled by him to comply with his wishes, then she was a consenting party, and that is a good defence to each of the charges."

This material passage from the summing-up is, we think, so phrased as to leave the jury in doubt where the burden of proof lay on this part of the case, if, indeed, it did not lead them to believe that it was for the appellant to establish the defence of consent. Other words were used in the summing-up and in the observations made by the Chairman in answer to questions put to him by the jury after he had concluded his summing-up which have some bearing upon this point, but we think it unnecessary to comment upon them in detail, inasmuch as it was conceded by the learned counsel for the Crown that he could not point to any direction which fulfilled the requirement laid down in the passage from MAY (*supra*) already mentioned.

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The second matter of complaint is a direction given to the jury in answer to a question. After a retirement which lasted for one hour, the jury returned into court and handed a note to the Chairman. The shorthand note of what then took place is as follows: "(The Chairman): Members of the jury, the question put to me is: If a man has reason to think that consent has been given, does that constitute consent? The answer is definitely 'No.' It is a question of fact. Do you want to retire again? (The Foreman of the Jury): I do not think we need retire again." The jury then "shortly conferred without leaving the jury box," and returned their verdict of "Guilty."

In our view this direction is open to grave objection. It is no doubt true that consent is a question of fact. The state of a person's mind is a question of fact, but, as we have said, it can be ascertained only by considering and weighing the ascertained facts about that person's conduct.

The proper answer to the jury's question would have been that if they, as reasonable persons, thought that the conduct of the prosecutrix, viewed as a whole, was consistent with consent, they ought not to find that the prosecution had negatived consent. It is, in our view, at least possible that such a direction, coupled with a correct and unambiguous direction as to the burden of proof, would have resulted in the acquittal of the appellant, and we are, therefore, compelled to come to the conclusion, notwithstanding the evident desire of the Chairman to do justice to the appellant's case, that the trial was not satisfactory.

This conclusion would have been enough to dispose of the case were it not for the fact that the learned counsel for the Crown relied in this Court upon the submission which he had unsuccessfully made at the trial, and argued that, this being a case in which it was unnecessary for the Crown to prove absence of consent, this Court ought not to quash the conviction.

We have given careful consideration to the question of

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law which this submission raises. The learned counsel on both sides referred us to passages in the judgments in CONEY (1882), 8 Q. B. D. 534. The subject-matter of that case was very different from that of the present case, but the judgments undoubtedly contain statements of the law which are of great value for the present purpose. Much reliance was placed, on behalf of the Crown, upon the following passage from the judgment of Cave, J., at p. 539: "The true view is, I think, that a blow struck in anger, or which is likely or intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial." We have considered the authorities upon which this view of the learned Judge was founded, and we think it of importance that we should state our opinion as to the law applicable in this case. If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected. What is, in one case, an innocent act of familiarity or affection may, in another, be an assault, for no other reason than that in the one case there is consent and in the other consent is absent. As a general rule, although it is a rule to which there are well-established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial. We

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are aware that the existence of this rule has not always been clearly recognised. In his Digest of the Criminal Law (7th ed.), Article 290, Sir James FitzJames Stephen enunciates the proposition that "every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim." This may have been true in early times when the law of this country showed remarkable leniency towards crimes of personal violence, but it is a statement which now needs considerable qualification. It is to be observed, indeed, that in Article 293 of his Digest, the learned author says: "It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another."

In early works of authority, such as Foster's Crown Cases and East's Pleas of the Crown, much learning upon the distinction between lawful and unlawful acts is to be found in the chapter dealing with homicide. At p. 259 of the former work (3rd ed.) Sir Michael Foster gives his reason for the proposition that a man who beats another "in anger or from preconceived malice" is responsible if fatal consequences ensue, in the following words: "What he did was *malum in se*, and he must be answerable for the consequence of it. He certainly beat him with an intention of doing him some bodily harm, he had no other intent, he could have no other; he is therefore answerable for all the harm he did." If an act is *malum in se* in the sense in which Sir Michael Foster used the words, that is to say, is, in itself, unlawful, we take it to be plain that consent cannot convert it into an innocent act.

There are, as we have said, well-established exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act. One of them is dealt with by Sir Michael Foster in the chapter just cited, where he refers to the case of persons who in perfect friendship engage by mutual consent in contests, such as "cudgels, foils, or wrestling," which are capable of causing bodily harm.

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The learned author at p. 260 emphasises two points about such contests: (1) that bodily harm is not the motive on either side, and (2) that they are "manly diversions, they tend to give strength, skill and activity, and may fit people for defence, public as well as personal, in time of need." For these reasons, he says that he cannot call these exercises unlawful.

Another exception to the general rule, or, rather, another branch of the same class of exceptions, is to be found in cases of rough and undisciplined sport or play, where there is no anger and no intention to cause bodily harm. An example of this kind may be found in BRUCE (1847), 2 Cox C. C. 262. In such cases the act is not in itself unlawful, and it becomes unlawful only if the person affected by it is not a consenting party.

It is not necessary to deal in this judgment with other exceptions to the rule which are wholly remote from the present case, such as the reasonable chastisement of a child by a parent or by a person *in loco parentis*.

In the present case it was not in dispute that the motive of the appellant was to gratify his own perverted desires. If, in the course of so doing, he acted so as to cause bodily harm, he cannot plead his corrupt motive as an excuse, and it may truly be said of him in Sir Michael Foster's words that "he certainly beat . . . with an intention of doing . . . some bodily harm, he had no other intent," and that what he did was *malum in se*. Nothing could be more absurd or more repellent to the ordinary intelligence than to regard his conduct as comparable with that of a participant in one of those "manly diversions" of which Sir Michael Foster wrote. Nor is his act to be compared with the rough but innocent horseplay in the case of BRUCE (*supra*). Always supposing, therefore, that the blows which he struck were likely or intended to do bodily harm, we are of opinion that he was doing an unlawful act, no evidence having been given of facts which would bring the case within any of the

exceptions to the general rule. In our view, on the evidence given at the trial, the jury should have been directed that, if they were satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix, they ought to convict him, and that it was only if they were not so satisfied, that it became necessary to consider the further question whether the prosecution had negatived consent. For this purpose we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.

This being our view of the law, we considered the question whether, in all the circumstances, it would be right to quash the conviction. The whole case was conducted, in so far as it was conducted in the presence of the jury, upon the footing that the issue of consent was the "vital question in the case." It is not too much to say that, in all probability, the only question which the jury felt called upon to decide, as the case was left to them, was the question whether in fact the prosecutrix was shown to have consented. We may summarise the position by saying that, of the two questions which should have been left to the jury, the first was not left at all, while the second was left to them with an inadequate and misleading direction. It may well be that, if the first question had been left to the jury, they would have answered it by saying that the appellant intended to cause and inflicted blows likely to cause bodily harm to the prosecutrix, so that the second question would not have arisen. But, although we think it probable that this would have been the jury's view, it is, in our opinion, impossible to say that they must inevitably have so found. There are many gradations between a slight tap and a severe blow, and the question whether particular blows were likely or intended to cause bodily harm is one

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eminently fitted for the decision of a jury upon evidence which they have heard. We may have little doubt what that decision would have been in this case, but we cannot, consistently with the practice of this Court, substitute ourselves for the jury and decide a question of fact which was never left to them. It is, therefore, impossible to say that facts have been proved which show the appellant's act to have been unlawful in itself. Without proof of such facts, he could be convicted only if the prosecution negatived consent, and upon the issue of consent there was a misdirection which may have led to a wrong verdict. For these reasons we came to the conclusion that the conviction must be quashed and the appellant discharged.

Conviction quashed.

Solicitors—for appellant, Wilkinson, Howlett & Moorhouse; for the Crown, Wontner & Sons.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

CARMEN TOMASSO.

1934.
27 *July*.

Cross Examination—Charge of Possessing Counterfeit Coins with Intent to Utter—Prisoner's Character not Put in Issue—Denial of Guilty Intent—Question as to Previous Conviction Inadmissible—Conviction Quashed.

The appellant, who was charged with possessing counterfeit coins with intent to utter them, contrary to section 11 of the Coinage Act, 1861, did not put his character in issue. He admitted possession of the coins, with knowledge that

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they were counterfeit, but denied that he had any guilty intent. He was cross-examined as to a previous conviction for a similar offence.

Held, the cross-examination was inadmissible, and the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on June 28, 1934, of possessing counterfeit coins with intent to utter them, contrary to section 11 of the Coinage Act, 1861, and was sentenced by the Common Serjeant to two years' imprisonment with hard labour.

The appellant, in his examination-in-chief, admitted possession of the coins knowing them to be counterfeit, but said that he had taken them deliberately in order to obtain evidence against another person and for the purpose of informing the police. He did not put his character in issue. In cross-examination he was asked the following question: "It is a fact that in 1926 you pleaded guilty to possessing counterfeit coin?" to which he replied, "Exactly."

T. J. Kelly, for the appellant:

The indictment contained a count under section 11 of the Coinage Offences Act, 1861, and a count under section 12, but the procedure laid down in section 37 was not followed and the appellant was tried only for one substantive offence under section 11. The question put to him in cross-examination regarding his previous conviction under the same section in 1926 was clearly inadmissible under the provisions of the Criminal Evidence Act, 1898, s. 1 (f) (*a*). Evidence with regard to a previous conviction did not show system, nor was it necessary to rebut a defence of accident, because here the appellant said in examination-in-chief that he took the coins deliberately in order to trap another person and to obtain evidence against that person.

The decided cases show clearly that, in order to make any evidence as to former guilty acts of the accused admis-

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sible, there must be some connection between the facts charged in the indictment and the facts proved in evidence. In proximity of time, in method, or in circumstances there must be a nexus between the two sets of facts; otherwise no inference can be drawn. [He referred to BOND, [1906] 2 K. B. 389, at p. 424.] There was obviously no nexus here between a previous conviction in 1926 and a similar charge in 1934, and in any event there is a distinction between former conduct tending to show guilty intent and a previous conviction. There is no reported case where evidence of a previous conviction has been admitted to prove guilty intent in the mind of a person charged with possessing counterfeit coins with intent to utter. It is also wrong in law to say that by admitting possession of counterfeit coins but denying intent to utter them or, in other words, by pleading not guilty to the indictment, the appellant put his character in issue and brought himself within the provisions of the Criminal Evidence Act, 1898, s. 1 (f) (*a*). If a man were charged with being found in a dwelling-house with intent to commit a felony and his defence was that he had entered the house in mistake for his own and had no intent to commit a felony, it would not be competent for the prosecution thereupon to ask him in cross-examination, on the ground that he had put his character in issue, if he had been convicted of burglary.

[AVORY, J., referred to WEEKS (1861), 30 L. J. M. C. 141, a coinage case.]

(*a*) Criminal Evidence Act, 1898, s. 1 (f): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged. . . ."

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In that case no evidence as to a previous conviction was admitted.

[He was stopped.]

Patrick Devlin, for the Crown:

It is submitted that the cross-examination as to a previous conviction was here admissible. No distinction is drawn in section 1 (f) (i) of the Criminal Evidence Act, 1898, between proof of the commission of another offence and proof of a previous conviction. The test one has to apply under that sub-section is whether the matter to which the question complained of related was admissible evidence or not. The evidence of the previous conviction in this case went to show a guilty design or to rebut a defence of mistake. The principle as to the admission of such evidence laid down in BOND (*supra*) has been applied to coinage cases in WEEKS (*supra*). As the evidence of a previous incident of this kind would have been admissible, the question about a previous conviction for a similar offence was admissible under the above sub-section. The appellant admitted that between 1926 and 1934 he had frequently been in possession of counterfeit coin, and there was evidence from which the jury could infer that he had been in possession with guilty intent. That provided a sufficient nexus between the former conviction and the offence charged.

THE LORD CHIEF JUSTICE: The appellant was convicted at the Central Criminal Court of possessing counterfeit coins with intent to utter them, contrary to section 11 of the Coinage Act, 1861. He now appeals against conviction, and the ground of appeal is that he was improperly cross-examined about a previous conviction. The indictment charged him with possessing the coins "knowing the same to be counterfeit and with intent to utter the same." When he went into the witness-box to give evidence on his own behalf he was cross-examined about a previous conviction which took place eight years ago. [His Lordship read from

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the transcript the relevant question and answer, as set out above, and continued:] In our opinion, that question was clearly improper and vitiates the conviction which followed. It was very unfortunate that the question was asked, because it may be that upon evidence properly adduced the appellant might have been convicted. It is not, however, possible to say that upon such evidence he must inevitably have been convicted, and it follows that the appeal must be allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE DU PARCQ.

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8 *October*.

ARTHUR RICHARD MANSER.

Evidence—Corroboration—Child—Unsworn Testimony of another Child not to be treated as Corroboration.

Where the evidence of a young child requires corroboration as a matter of law or practice, the unsworn testimony of another child, which itself requires to be corroborated, cannot be treated as supplying the requisite corroboration.

Appeal against conviction (by leave of the Court).

The appellant was convicted at Sussex Assizes on July 15, 1934, of carnal knowledge of a girl under thirteen years of age and was sentenced by Mr. Commissioner Porter, K.C., to six months' imprisonment.

The appellant was a soldier of eighteen years of age, who lived next door to Barbara Wickenden, the girl against whom the offence was alleged to have been committed.

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The case for the Crown was that the appellant was fishing at a pond near his home and was there joined by the girl Barbara, her little brother and her sister Doris, aged nine years, that he suggested a game of hide-and-seek, took the girl Barbara into a wood to hide and there committed the offence. The testimony of Doris Wickenden, who gave evidence at the trial without being sworn, was substantially the only corroboration of the evidence of Barbara Wickenden.

G. D. Roberts, for the appellant:

The only substantial corroboration of Barbara Wickenden's evidence relied on by the prosecution was the evidence of her sister Doris, who gave evidence unsworn, and the jury were never told that that could not properly be regarded as corroboration, because such evidence itself by statute requires to be corroborated. Further, the jury were never told that the evidence relied on as corroboration must be of such a nature as to implicate the accused. Moreover, the medical evidence was more consistent with the innocence than with the guilt of the accused. [He was stopped.]

H. J. Baxter, for the Crown:

The summing-up was in some respects unsatisfactory, but the jury were entitled to regard the evidence of the two girls as being mutually corroborative. The question of the younger girl's evidence was one of weight rather than admissibility. In GREGG (1932), 24 Cr. App. R. 13, the evidence of a child of nine appears to have been regarded as corroborating the evidence of a child of seven, although it is true that in that case the evidence of the child of nine was given upon oath.

THE LORD CHIEF JUSTICE: This appellant was convicted at Sussex Assizes of carnal knowledge of a girl under the age of thirteen years and was sentenced to six months'

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imprisonment. He now, by leave of the Court, appeals against conviction. The grounds of appeal are, among others, that the verdict was against the weight of the evidence and that there was no real corroboration of the story of the child. The appellant, who was a young soldier of eighteen years of age and of exemplary character, lived next door to the girl, Barbara Wickenden. The case for the prosecution was that the appellant was fishing at a pond near his house and was joined by the girl, her little brother and her sister named Doris, that he then suggested a game of hide-and-seek, took the girl Barbara into a wood to hide and there committed the offence. The Commissioner in his summing-up did indeed tell the jury that it was dangerous to convict unless there was some corroboration of the girl Barbara's story, but nowhere was there any definition of corroboration which would satisfy the law as explained in BASKERVILLE (12 Cr. App. R. 81; [1916] 2 K. B. 658), that corroboration must be evidence coming from an independent source which in some particular corroborates the evidence of the accuser and tends to implicate the accused person. [His Lordship then referred to certain passages in the summing-up, and to the evidence, and continued:] There is one further matter which is the most important of all and may indeed be regarded as conclusive. The story of the little child Doris, who was nine years of age and had given evidence without taking the oath, was treated as corroborative of the evidence of the girl Barbara. Now by statute the evidence of the little child who had not been sworn was not to be accepted as evidence at all, unless it was corroborated. The argument for the prosecution is therefore an argument in a circle. Let it be granted that the evidence of Barbara has to be corroborated: it is corroborated by the evidence of Doris. She, however, also needs to be corroborated. The answer is that she is corroborated by the evidence of Barbara, and that is called "mutual corroboration." In

truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated. It clearly was not corroborated by the evidence of the girl Barbara.

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Not merely, therefore, did the summing-up in some respects fail sufficiently to direct the jury on the important matter of corroboration, but the intrinsic evidence adduced on the part of the prosecution was deficient, and rested to no small extent on the evidence of an unsworn child. We have no alternative but to allow the appeal and to quash the conviction.

Conviction quashed.

Solicitor for appellant: Arthur Piper, Cranbrook.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE DU PARCQ.

THOMAS JOSEPH DAVIDSON.

1934.
15 *October.*

Murder—Corpus Delicti—No Body Found—Confessions by Prisoner prior to Trial—Subsequent Retractation—Evidence by Prisoner at Trial that Person alleged to be murdered was dead—No other direct Evidence of Death—Conviction Affirmed.

The prisoner was charged with the murder of his son, whose body had not been found. The prisoner prior to trial had made several confessions to the effect that he had murdered the boy and disposed of the body, but at the trial he retracted these and gave evidence that he had found the dead body of the boy in a canal. Apart from the

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prisoner's statements, there was no direct evidence that the boy was dead.

Held, the evidence was sufficient to justify a conviction.

Observations on evidence of the *corpus delicti* on a charge of murder.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on September 18, 1934, of the murder of his son, and was sentenced by Atkinson, J., to death.

From October to December, 1933, the appellant had been living apart from his wife and his son aged seven, but on December 19 he met his wife and persuaded her to resume matrimonial life with him at Yiewsley, Middlesex. On December 21 Mrs. Davidson again left the appellant, and on that night the appellant went to a house at Hanwell, where his son was then living, and took him to Yiewsley. After December 23 there was no trace of the boy, nor was his body ever discovered. Subsequently, in July 1934, the appellant made three confessions the first in a letter to a police inspector, the second in a statement to the police, and the third in a letter to his wife— in which he stated that he had drowned the boy and placed his body on a refuse dump. At the trial he retracted these statements, and gave evidence that he had found the boy's dead body in a canal. The further facts of the case appear fully in the judgment.

Frederick W. Wallace, for the appellant:

Although the attention of the Judge at the trial was not drawn to the absence or want of proof of the *corpus delicti*, this is now relied upon as a ground of appeal. The Crown tendered no evidence of an unlawful killing or of any killing. Apart from evidence emanating from the appellant himself, either in confessions made prior to trial or on oath at the trial, there was therefore no evidence of the *corpus delicti*. It is conceded that in an ordinary case a

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confession by the accused person may be sufficient evidence of the crime: KERSEY (1908), 1 Cr. App. R. 260. In that case the prisoner, though indicted for murdering her child, was found guilty of concealment of birth. The dictum of Lord Alverstone as to the sufficiency of a clear and unequivocal confession was made on appeal against that conviction, and the dictum is, therefore, not an authority in the case of murder. In murder cases, where the body of the person alleged to have been murdered has not been found, it has been the practice to require independent evidence that the crime has been committed, apart from the evidence of the prisoner. In SULLIVAN (1887), 16 Cox 347, at p. 354, Palles, C.B., said, with regard to murder cases, "in no such case ought a confession to be acted upon, without evidence of the *corpus delicti*, by proof of the act done, or of the body being found dead; and, as I think, found dead under such circumstances which raise a presumption that the deceased came by his death by unlawful means." Here the only evidence of the act done or of the body being found dead came from the appellant himself, and there was therefore no independent evidence of the *corpus delicti*. In any event, since the appellant on oath at the trial retracted his confessions, the jury should have been specially directed upon the worthlessness of his sworn or unsworn statements.

Eustace Fulton, for the Crown:

Where the body of a person alleged to have been murdered has not been found, the jury should be directed that they ought to require very strong circumstantial evidence, if they act on the evidence of circumstances alone. Here, in addition to circumstantial evidence of the death of the boy, there was the sworn evidence of the appellant that he had found the dead body of the boy in the canal and put it on a refuse dump. It was never at any time suggested that the death of the boy was in issue. The jury were justified in saying that the entire conduct of the prisoner was quite inconsistent with the story told by him

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in the witness-box and was consistent with the story related in his confessions.

THE LORD CHIEF JUSTICE: This appellant, Thomas Joseph Davidson, was convicted at the Central Criminal Court of the murder of his little son; he was sentenced to death, and now appeals against conviction. The grounds of appeal are that there was insufficient direction upon a retracted confession, that there was misdirection as to corroboration, and that the verdict cannot be supported by the evidence.

It is not necessary to repeat the whole of this sad story, which has been sufficiently indicated in the course of the argument. The appellant, who is a man of thirty-four years, lived at a hut at some piggeries belonging to a man named Amer near to a refuse dump at Yiewsley. He was at the material time living apart from his wife, and their only son, a child of a little more than seven years, was kept by his wife at the house of a Mrs. Clack, where also she herself was living. On December 19, 1933, the appellant found out where his wife was living and pressed her to come and stay in the hut. She stayed, in fact, two nights, and on December 21 she left to return to the house of some friends. On that afternoon, December 21, at about half past five, the appellant, according to the evidence, took the son away from Mrs. Clack's house and called at a café kept by a man named Lee with the child both that night and on the two following nights, and the appellant told Mr. Amer, who saw the boy, that he was taking him to some friends at Westbourne Park. On the following day, December 22, the appellant told Mrs. Clack that the boy had been killed by a lorry the night before, and he asked her to tell his wife. He told Mr. Amer that he had taken the boy to Westbourne Park, and again on the evening of December 23 he told a man named Rose that the boy had been killed by a lorry, and that he was to tell his wife that

story. On Sunday, December 24, the appellant told Mr. Amer that the boy was dead, that he had been drowned on the Thursday night, but Mr. Amer did not believe what was said; and again that evening the appellant told a man named Tibbles that the boy had been drowned in the canal near the piggery. On the same night about ten o'clock he told Mr. Lee, the proprietor of the café, that the boy had been killed by a lorry. The appellant remained in the hut on December 25, 26 and 27. Mr. Amer told him several times to leave and threatened him with the police. Afterwards, on January 10, 1934, the appellant was arrested for stealing fowls and was sentenced. On April 11, 1934, he told the Inspector that his boy was quite all right and in safe keeping, and on July 2 he told the Inspector that his son was down in Essex. Then followed a series of confessions. On July 21, 1934, the appellant wrote a letter, addressed to Inspector Greenacre: "My son is dead, and I am the cause of his death, in other words I killed him, and that, of course, accounts for nobody being able to find him, and I think it is best for me to make a clean sweep of things now and get things squared up." Afterwards he made a long statement to the police at Ealing, dated July 26, and in that statement he said that he had jumped into the canal dock with the boy. "I recovered myself" he said, "on the opposite side of the canal." Then: "I got up and hunted for Jackie, found him a good distance away in the water. He was dead." Then he went on to say how he took the boy out of the water, laid him on the bank of the canal, tried to pump the water from his stomach, but it was hopeless, and he then went over to the piggery, fetched a blanket off the bed, put the boy in the blanket, and carried him to where refuse was being tipped. "I left him there at the edge of the dump." In that statement the appellant added that afterwards he went back to where he had left the body, but it had been covered by refuse, and he could not find it. In the course of that

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statement he said: "When I jumped into the canal with Jackie it was my intention to drown both of us"; and finally on July 30 he wrote a letter to his wife reiterating what he had previously said, and expressing his wish that she might come back to him if only to see him.

Now those confessions having been made, the appellant at the trial gave evidence on his own behalf, and undoubtedly in that evidence he denied the truth of the confessions, and retracted them, and he gave a series of reasons—odd reasons the jury may have thought—why the confessions had been made; but he said this, and as the passage is important I read it textually from the transcript. Having described how he found the little boy in the water about twenty minutes past two in the morning he was asked: "*Q.* Did you take him out of the water? *A.* Yes. *Q.* What did you do then? *A.* Tried to pump the water from his stomach. *Q.* Did he show any signs of life? *A.* None whatever. *Q.* What did you do then? *A.* Went over to the piggery and got a blanket. *Q.* What did you do then? *A.* Came back and wrapped him in the blanket and carried him over to where there was a fire right over the further side of the tip. *Q.* Did that revive him? *A.* None whatever, sir. *Q.* What was your state of mind when you realised the boy was dead? *A.* Heart-broken if anything, sir."

Now, in those circumstances, the statement that the boy was dead did not at the conclusion of the trial rest upon the unsworn confessions, or any of them, made by the appellant; the statement that the boy was dead was confirmed by the sworn testimony of the appellant himself, and, in our view, the law upon this matter is accurately stated in Article 788 of section 9 of Halsbury's Laws of England (2nd ed.), dealing with "Criminal law and procedure": "Where no body or part of a body has been found which is proved to be that of the person alleged to have been killed, the accused person should not be convicted either of

murder or manslaughter, unless there is evidence either of the killing or of the death of the person alleged to have been killed. In the absence of such evidence there is no onus upon the prisoner to account for the disappearance or non-production of the person alleged to be killed." In this case it is unfortunate that the attention of the learned Judge at the trial was not pointedly directed to the question of evidence of the *corpus delicti*, and if the attention of the learned Judge had been so directed, one can hardly doubt that he would specifically have put the question to the jury: Are you satisfied here that this child is dead? and in view of the evidence given by the appellant himself, apart from the rest of the evidence, there can be no doubt what the answer of the jury would have been. It remains, however, unfortunate that the topic was not expressly raised, and the question was not expressly put. It was involved, no doubt, in the question which the learned Judge did put to the jury: "You have to ask yourselves the question whether you are all satisfied that he committed this crime." Presumably, if the matter which has been argued, and properly argued, before us, had been raised at the Central Criminal Court, there must have been two questions put to the jury: Are you satisfied that this boy is dead? if so, are you satisfied that he was murdered by the prisoner? But in our opinion it was perfectly open to the jury, upon the evidence which was given, to hold that the boy was dead, and, after hearing the evidence of the appellant, to disbelieve the retractation of his confessions which he made, and to accept the statement which he had previously made, namely, that he was the cause of his boy's death. As Mr. Eustace Fulton has said, all his conduct was inconsistent with the view that this child had come by his death in a way not involving guilt upon the part of the appellant.

Subject to the observation which has been made upon the omission to raise this particular topic in a pointed way,

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it seems to us that this summing-up of the learned Judge is not open to adverse criticism, and there can be no doubt that if the topic had been raised the learned Judge would have dealt with it.

In our view, the verdict of the jury was one to which they were entitled to come upon this evidence, and the Court has no alternative but to dismiss this appeal.

Appeal dismissed.

[This judgment is a practically *verbatim* transcript supplied by the courtesy of the Home Office.]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

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ALBERT EDWARD HOLDING.

Sentence—Incorrigible Rogue—Duty of Quarter Sessions to examine into Circumstances of Case—Maximum Sentence not necessarily appropriate—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 10 (*a*).

Where a prisoner is committed to quarter sessions for sentence as an incorrigible rogue, it is the duty of that Court to examine into the circumstances of the conviction at petty sessions, and, after affording the prisoner an

(*a*) Vagrancy Act, 1824, s. 10 "When any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned . . . and . . . kept to hard labour for any time not exceeding one year from the time of making such order. . . ."

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opportunity of cross-examining any witnesses called for the Crown and of addressing the Court, to consider what is the appropriate sentence. It is by no means to be regarded as a matter of course that the maximum sentence is appropriate in every case.

Appeal against sentence.

The appellant was on September 5, 1934, convicted at Highgate Petty Sessions as an incorrigible rogue and was committed to Middlesex Quarter Sessions to be dealt with as such. On September 20, 1934, he was sentenced by the Chairman to twelve months' imprisonment with hard labour.

R. E. Seaton, for the appellant:

The conditions of section 10 of the Vagrancy Act, 1824, were not complied with, as there was no examination into the circumstances of the case. A police officer was called by the prosecution, who gave a list of the appellant's previous convictions and made some reference to his previous history, but the appellant had no opportunity of cross-examining the officer or saying anything in mitigation. The facts of the conviction at Highgate Petty Sessions were never before the Court. [He referred to COPE, 18 Cr. App. R. 181, [1925] W. N. 108.]

J. F. Eastwood, for the Crown:

Although it is not compulsory on the Court of quarter sessions to re-hear the whole of the facts proved at petty sessions, it is conceded that there must be some examination into the circumstances of the case and that what took place at quarter sessions in this case was inadequate, especially as the evidence which supported the conviction at petty sessions was not very satisfactory.

THE LORD CHIEF JUSTICE: This appellant was convicted at Highgate Petty Sessions as an incorrigible rogue and was committed for sentence to Middlesex Quarter Sessions.

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He was there sentenced to twelve months' imprisonment with hard labour and now appeals against that sentence.

There are two very unfortunate incidents in this case. The first is that the Court below appear entirely to have ignored their duty under section 10 of the Vagrancy Act, 1824, of examining into the circumstances of the case. There is nothing here which can be called an examination into the circumstances of the case. To judge from this case and so many others which have come before this Court, there is an impression abroad that, when a prisoner is sent to quarter sessions to be dealt with as an incorrigible rogue, the only duty of that Court is to pass the maximum sentence of twelve months' imprisonment with hard labour. Their first duty is to examine into the circumstances of the case and their second is to consider what is the appropriate sentence.

Here not only were the provisions of the Statute passed over, but the appellant was not given any opportunity of cross-examining the police officer or of addressing the Court. The attitude of the Court appears to be expressed in one sentence used by the Chairman after the officer had given evidence of previous convictions: "That is sufficient for our purpose."

In these circumstances we have no alternative but to quash this sentence.

Sentence quashed.

Solicitors for the Crown: Wontner & Sons.

WILLIAM JOHN LONG.

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WILLIAM JOHN LONG.

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See previous report.

Appeal against sentence (by leave of the Court).

The appellant was on September 4, 1934, convicted at Wealdstone Petty Sessions as an incorrigible rogue and was committed to Middlesex Quarter Sessions to be dealt with as such. On September 20, 1934, he was sentenced by the Chairman to twelve months' imprisonment with hard labour.

The facts were similar to those in the previous case, except that the appellant was given an opportunity of cross-examination and of addressing the Court.

The appellant, in person.

J. F. Eastwood, for the Crown:

The facts of this case are similar to those of the last, except that here there was clearly evidence to justify the conviction in the Court below.

THE LORD CHIEF JUSTICE: This case is in most respects similar to the last. No examination was made into the circumstances of the case, as provided by section 10 of the Vagrancy Act, 1824, and the Chairman in passing sentence used these words: "You have been convicted in the Court below and sent here for sentence, and we have to see if there is any reason why imprisonment should not be inflicted upon you, and there is none. Therefore, you will go to prison with such hard labour as you can properly perform for twelve calendar months."

It is really high time that this practice was brought to an end. In cases of this kind it is the duty of the Court of quarter sessions to examine into the circumstances of the case and it is not at all a matter of course that, if there

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is to be imprisonment, it must be imprisonment for the maximum term. Here the Court below seems to have failed to perform its duty. We are bound to allow the appeal, quash the sentence and release the appellant.

Sentence quashed.

Solicitors for the Crown : Wontner & Sons.

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HYMAN QUINTNER.

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HYMAN QUINTNER.

Indictment—Accessory after the Fact to Housebreaking—Purported Amendment after Verdict—Statement and Particulars of Offence inadequately described—Conviction quashed.

A prisoner was convicted on a count of an indictment in the following terms : " Statement of Offence. Accessory after the fact. Particulars of Offence. H. Q., . . . , knowing that one J. D. had committed a felony, to wit, housebreaking and larceny, did receive, comfort, harbour, or assist the said J. D." After verdict the Judge permitted this count to be amended, the amendment consisting in striking out the words " housebreaking and larceny " in the particulars of offence and substituting the words " receiving stolen property."

Held, the count as originally drawn was bad, in that it omitted in the statement of offence to specify any felony, and the amendment was bad in that it did not in the particulars of offence describe the alleged felony as " receiving stolen property well knowing it to have been stolen " and the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at London County Sessions on September 12, 1934, on a count of an indictment which originally charged him with being an accessory after the fact

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to housebreaking and larceny, but which purported to have been amended after verdict so as to charge him with being an accessory after the fact to receiving stolen property. He was sentenced by the Chairman to nine months' imprisonment with hard labour.

The appellant was charged jointly with two other prisoners named James Dent and John Amson. The first count charged Dent with housebreaking and larceny on August 16, 1934, and the second charged him with receiving. The third and fourth counts related to Amson. The fifth count, which was withdrawn from the jury at the close of the case for the prosecution, charged Quintner with receiving stolen property. The sixth count was in the following terms: "Statement of offence. Accessory after the fact. Particulars of offence. Hyman Quintner, on the seventeenth day of August, 1934, in the county of London, knowing that one James Dent had committed a felony, to wit, housebreaking and larceny, did receive, comfort, harbour, or assist the said James Dent." The jury convicted Dent on the second count and the appellant on the sixth count. Immediately after verdict, at the suggestion of counsel for the prosecution, the Chairman allowed this count to be amended. The purported amendment consisted of striking out the words "housebreaking and larceny" in the particulars of offence and substituting the words "receiving stolen property."

P. R. Hollins, for the appellant:

The count as originally drawn was bad, in that it did not name in the statement of offence any felony to which the appellant was alleged to have been accessory, and the amendment was bad, inasmuch as it specified the alleged felony merely as "receiving stolen property," which, in itself, is no felony. [He was stopped.]

J. F. Eastwood, for the Crown, did not seek to support the conviction.

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THE LORD CHIEF JUSTICE: It is quite obvious, as Mr. Eastwood on behalf of the prosecution frankly recognises, that this appeal must be allowed. [His Lordship read the sixth count of the indictment as set out above, and continued:] The jury acquitted James Dent on the charge of housebreaking and larceny, and convicted him on the charge of receiving. On being asked by the Clerk of the Peace: "Do you say [the appellant] is guilty or not guilty of being an accessory after the fact?", the jury returned a verdict of guilty. They were asked by the Chairman: "Knowing that Dent had committed the felony of which you have convicted him, that is receiving stolen property knowing it to be stolen, that Quintner assisted him—is that what you mean?" and the foreman replied "Yes, my Lord." The indictment purports to have been amended accordingly, and it is before the Court. The amendment consisted of striking out the words "housebreaking and larceny" and writing in the words "receiving stolen property" and no more. Not a word was inserted with regard to "well knowing it to have been stolen" and, as Mr. Eastwood recognises, it was a bad amendment badly made in a bad count. It is clear that this conviction cannot stand and that the appeal must be allowed.

Conviction quashed.

Solicitors for the Crown: Wontner & Sons.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

JAMES WRIGHT.

1934.
13 & 14 *Nov.*

Evidence—Character of Prisoner—Isolated Statement by Witness—Suggestion that Prisoner had been previously convicted or was of bad Character—Jury not warned to disregard Effect of Statement—No Substantial Miscarriage of Justice—Conviction affirmed.

A witness for the Crown, in the course of being examined-in-chief with regard to his identification of the prisoner, made an isolated statement to the effect that he had seen a photograph of him in the "rogues' gallery" at Scotland Yard. No further reference to this statement was made by counsel on either side or by the presiding Judge.

Held, although such a statement would inevitably convey to the jury the suggestion that the prisoner had been previously convicted or was of bad character, in the circumstances of the case the proviso to section 4 of the Criminal Appeal Act, 1907, should be applied and the conviction affirmed.

WILLIAMS and WOODLEY (1920), 14 Cr. App. R. 135, followed and applied.

Where by accident an isolated statement of this nature has been made by a witness, it may be the best course for the presiding Judge to make no reference to the matter.

Appeal against conviction and sentence.

The appellant was convicted on October 18, 1934, at the Central Criminal Court of larceny and of conspiracy to steal and was sentenced by the Recorder of London to three years' penal servitude.

At the trial the principal witness for the Crown, when being examined-in-chief with regard to his identification of the appellant, said: "I identified him in the 'rogues' gallery' at Scotland Yard."

No reference to this statement was made by counsel on

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either side or by the Recorder. The further facts of the case, so far as they are material to this report, appear fully in the judgment.

Roland Oliver, K.C. (*J. F. Eastwood* with him), for the appellant:

The trial was in various respects unsatisfactory. In the first place, the jury were informed that the appellant was a man of bad character by the statement of the chief witness for the Crown that he had identified the appellant in the "rogues' gallery" at Scotland Yard. An allusion in the summing-up to the fact that the police were apparently looking for the appellant tended to remind the jury of the above statement. Further, the appellant had admitted absconding from his bail, yet a question which could not be relevant and which suggested the commission of another offence, namely whether he was travelling with a false passport, was put to him in cross-examination. The effect of the accidental statement suggesting that the appellant was of bad character might have been remedied by the Judge warning the jury to pay no attention to it. [He referred on this point to PALMER (1914), 10 Cr. App. R. 77; KURASH (1915), 11 Cr. App. R. 166; WILLIAMS and WOODLEY (*supra*); and REDD (1922), 17 Cr. App. R. 36.] There appears to be no case where a slip of this kind has occurred and no comment has been made by the Judge and yet the conviction has been affirmed. Secondly, the issue of the appellant's handwriting was raised at the trial without notice having been given that specimens of the appellant's handwriting were to be introduced. These specimens were put before the jury without the evidence of any expert in handwriting. This might not be open to objection in a case where the similarity was very plain, but here the similarity was not so plain that the handwriting could be left to the jury without expert evidence. [He referred on this point to

HARVEY (1869), 11 Cox 546, and RICKARD (1918), 13 Cr. App. R. 140.] Thirdly, a very damaging statement alleged to have been made by appellant at the police station, namely "I am willing to pay Mr. Bussey his £300 back," was given in evidence by a police officer, and it was not pointed out to the jury that the record of that statement in the officer's notebook was open to suspicion with regard to its accuracy.

G. D. Roberts, for the Crown:

Apart from the unfortunate observation by the witness Bussey with regard to the "rogues' gallery," the evidence against the appellant was very strong, and it is submitted that this is a case where the Court should apply the proviso to section 4 of the Criminal Appeal Act, 1907. The question of applying for the discharge of the jury after the above observation had been made was considered by the prosecution, but it was decided that it was not their duty to make the application. Counsel for the defence did not ask for the discharge of the jury or for a warning from the Recorder that the matter ought to be disregarded, nor did he refer to the matter in his speech. More harm might have been done by stressing the matter if the Recorder had specifically warned the jury to disregard it. There is no authority to the effect that in such circumstances the Judge is bound to warn the jury. The matter is always one for the discretion of the Judge. With regard to the question of the passport, it was relevant to prove that the appellant, who had absconded from his bail, was travelling under a false name. With regard to the entry of the appellant's statement in the police officer's notebook, the officer gave an explanation which the jury were entitled to regard as satisfactory. [The Court intimated that they did not require argument on behalf of the Crown on the question of the specimens of the appellant's handwriting having been submitted to the jury without expert evidence.]

Roland Oliver, K.C., replied.

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MR. JUSTICE AVORY: This appellant was convicted at the Central Criminal Court of stealing £293 by means of a trick, commonly known as the confidence trick, from an American subject named Bussey. That offence was alleged to have been committed in May, 1933. In pursuance of the usual trickery practised in these cases, Bussey had handed over not only money, but also a wallet containing his passport. The two men who had practised this trick upon him were passing at that time under the names of Phillips and O'Rorke. The case for the prosecution was that the appellant was the man who passed under the name of Phillips, and it was suggested that he was the person who, having the address at which Bussey was staying, shortly afterwards returned the passport to that address. Neither of the men who had committed the offence could be arrested at the time, but the appellant was arrested in March, 1934. Immediately after the commission of the offence Bussey had reported it to the police and had identified a certain photograph in the possession of the police at Scotland Yard. It was in consequence of that identification and of a description given by Bussey that the appellant was arrested. At the time of the arrest Bussey was not in this country and the appellant, after being charged, was released on bail, but on March 10, 1934, Bussey returned to this country and at an identification parade identified the appellant as the man who had passed under the name of Phillips. The appellant was due to appear at the police Court on remand on a subsequent day in March, but absconded and was not heard of again until September, when he was arrested at Newhaven as he left the boat which had come from Dieppe. He was then travelling under the name of Walpole, having in his possession a passport in that name, to which admittedly he had no right. He gave his name at the time as Wright and in that name he was subsequently indicted, but at the trial he stated that his real name was Searle. In due course he

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was brought again before the magistrate and committed for trial. He was subsequently convicted and sentenced to three years' penal servitude.

Upon this appeal Mr. Roland Oliver has exhaustively dealt with every point which could properly be urged on behalf of the appellant. The first point which was taken was that at the trial the jury were improperly informed that the appellant either had been previously convicted or was a person of bad character. That contention is based on an unfortunate answer which Bussey gave in answer to a question about his identification of the appellant. He said that he had identified the photograph of the appellant in what he called the "rogues' gallery" at Scotland Yard. There is no question that such a statement would convey to the jury either that the appellant had been previously convicted or at least was a person of bad character. The Court is quite prepared to accept Mr. Roland Oliver's contention that that must be the inevitable inference which a jury would draw.

Before dealing further with that point, it is well to see what were the other matters urged in support of this appeal. It was said that there was a question of the handwriting on the envelope in which the passport was returned and that that envelope together with some proved specimens of the appellant's handwriting were before the jury, but that no expert in handwriting was called to point out the similarities between the two forms of handwriting. Further, it was said that the appellant had a grievance because he had had no notice that the prosecution proposed to put in evidence the specimens of his handwriting which had been taken when he was in custody. It now appears, and Mr. Roland Oliver has properly admitted, that, when the case was before the magistrate, evidence was given which indicated that the prosecution were going to rely on this matter of handwriting. It is quite true that there was an omission

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to give specific notice of these two specimens of the appellant's handwriting. At most that is a grievance and cannot affect the admissibility of the evidence put before the jury, and, if the appellant or his counsel thought that he was being prejudiced by having had no notice and really desired to call expert evidence to deal with the question of handwriting, he could have applied for an adjournment, but he did not do so. We think that there is no ground for saying that on this question of handwriting any injustice was done to the appellant, and we are quite satisfied that it was competent for the jury, without the evidence of an expert, to examine the handwriting on the envelope together with the undisputed handwriting of the appellant.

The next point was with regard to a statement alleged to have been made by the appellant at the police station after he had been arrested in March, 1934. A police sergeant gave evidence that he had overheard what the appellant said to Inspector Law, and Inspector Law also gave evidence of the words used. The sergeant also gave evidence that he had been instructed by the Inspector to make a note of the words in his notebook. Although some time was spent in the examination of the notebook, there is no reason to doubt the evidence of the sergeant that, having been told to make a note, he was called away on important police business and made a note in his book of matters connected with another case, and afterwards entered in his book the words which he swore had been used by the appellant: "I am willing to pay Mr. Bussey his £300 back." If that was said, there was only one possible inference to be drawn from it. The appellant denied that he had ever used those words, but admitted that he had used words which, if not so significant, might be certainly to some extent significant of his having been a party to the commission of the offence. He admitted having said: "If I owe this man money I am willing to pay him." In these circumstances, we have no doubt that the jury were entitled to accept the evidence

given by the sergeant of the actual words said to have been used by the appellant.

A further ground of appeal urged was that the appellant had been improperly cross-examined about the use of a false passport. We think that, the appellant having absconded from his bail, it was perfectly legitimate for the prosecution to discover by cross-examination what the appellant had been doing since he absconded and to ask whether he had taken any steps to disguise himself for the purpose of preventing his arrest and to ascertain that he was disguising himself in one sense by using false names and travelling in the name of Walpole with a passport which did not belong to him.

Having dealt with these points which do not constitute any ground for interfering with this verdict, it is necessary to say something further with regard to the first point, which is the only one that has required serious consideration. Complaint is made that the Recorder made no reference to the unfortunate statement by Bussey which would lead the jury to infer that the appellant was a person of bad character or had been previously convicted—or rather the complaint is that the Recorder did not warn the jury against being influenced by that statement. It is also complained that the Recorder by the incidental use of one expression, that the police were "looking for" the appellant, invited the jury's attention to Bussey's observation. That expression is a perfectly harmless and innocent one, for, unless a crime is detected on the spot, the police are always looking for the person who has committed it. We have come to the conclusion that in a case of this kind, where by accident an observation of this nature has been made, it may very well be that the best course for all parties—prosecution, defence and trial Judge—to pursue is to abstain from making any reference to it at all. The making of any reference to the matter may only tend to impress it more strongly on the minds of the jury.

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We think that this case should be dealt with on the lines of WILLIAMS and WOODLEY (1920), 14 Cr. App. R. 135, where the ground of appeal was that an abstract of the indictment had been handed to the jury when they retired with notes on it to the effect that there were previous convictions against both appellants. It was argued that that was a serious irregularity and that the convictions ought not to stand. The Lord Chief Justice (Lord Reading), after referring to the irregularity said, at p. 137: "The result is that the jury had before them information about the previous convictions of the appellants. That is information which never ought to have been in the possession of the jury. The placing of that information in their possession is an irregularity, and a serious irregularity, and therefore the appellants, if the case rested there, would have been entitled to succeed here. But the matter does not rest there, because to prevent injustice being done to persons charged with crime the Legislature, in passing the Criminal Appeal Act, had in mind irregularities and slips of this kind, and some misstatement or some misdirection of law which might be given at the trial, and in its anxiety to ensure that justice in its widest sense should be done, it passed a proviso to section 4 of the Act of 1907, which gave this Court power, notwithstanding that there was an irregularity, to dismiss the appeal if this Court considers that no substantial miscarriage of justice has actually occurred." After dealing with the meaning of those last words and quoting the judgment of Channell, J., in COHEN and BATEMAN (1909), 2 Cr. App. R. 197, at p. 208, he continued: "It is sufficient to say that here is a case of a serious irregularity, and that applying the proviso of section 4 of the Act of 1907, we have come to the conclusion on the facts of this case, and having regard to the evidence given at the trial, that without this irregularity, and assuming that there were no notes of the previous convictions of the appellants on the abstract supplied to the jury, they must inevitably have

arrived at the same verdict of guilty against the appellants." We adopt those words as applying to this case and for these reasons are of opinion that this appeal must be dismissed. We see no grounds for interfering with the sentence.

Appeal dismissed.

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Solicitors for appellant : Conway (Philip), Thomas & Co.
Solicitors for the Crown : Wontner & Sons.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

ARTHUR GUY CARLESS.
FRANCIS JEFFERSON STAPLEY.

1934.
3 & 4 *Dec.*

Indictment—Excessive number of counts—Obtaining money by False Pretences—Conspiracy to Defraud.

Observations on the form of indictment where several defendants are charged with various offences of obtaining money by false pretences and conspiracy to defraud.
KING, [1897] 1 Q. B. 214, followed and applied.

Appeals against conviction, and (in the case of the first appellant) also against sentence.

The appellants were charged with three other men named Marsh, Bickerdike and Glen (see p. 49, *post*) at the Central Criminal Court on an indictment containing twenty-five counts relating to various alleged offences of obtaining money by false pretences and conspiracy to defraud, and were convicted on four counts and sentenced

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by the Common Serjeant (Sir Holman Gregory, K.C., now the Recorder) on October 10, 1934, Carless to concurrent terms of five years' penal servitude and two years' imprisonment with hard labour, and Stapley to twelve months' imprisonment with hard labour.

E. G. Hemmerde, K.C., and *F. H. Collier*, for the appellant Carless.

Bernard Gillis, for the appellant Stapley.

Eustace Fulton and *G. B. McClure*, for the Crown.

It is unnecessary to set out the facts of the case, which is reported solely on account of certain observations with regard to the form of the indictment in such cases.

THE LORD CHIEF JUSTICE, in the course of delivering the judgment of the Court, said: There were no fewer than twenty-five counts in the indictment. As the case proceeded several counts were withdrawn, and on some counts the appellants were acquitted. It is impossible to understand why the four counts upon which these two appellants were convicted should have been left to the jury, when other counts of the same kind had been withdrawn from the jury. I think the observations of Mr. Justice Hawkins in KING, [1897] 1 Q. B. 214, at p. 216, apply to this case. In that case Mr. Justice Hawkins said: "The defendant was tried for obtaining and attempting to obtain goods by false pretences upon an indictment containing no fewer than forty counts; and I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing, as these do, several distinct charges. Though not illegal, it is hardly fair to put a man upon his trial on such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given

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upon the others. In such a case it would not be unreasonable for the defendant to make an application that each count, or each set of counts, should be taken separately." These remarks apply *a fortiori* to the present indictment, because it contains some counts against the appellants only, some counts against other prisoners, and other counts against both the appellants and the other prisoners.

When one looks at the shorthand note of the evidence and the summing up, it is clear that great confusion arose. The jury were absent for four hours twenty-nine minutes before convicting these two appellants. It is said that this kind of indictment is common, but in our view it ought to cease to be common. It is not fair to the accused, not fair to the jury, not fair to the Judge. [His Lordship then dealt with the evidence and the summing up, stating that the trial was most unsatisfactory, and added:] It is to be hoped that an indictment like this will never again be brought into this Court. [His Lordship then said that for the above reasons the convictions of the appellants must be quashed.]

Convictions quashed.

Solicitors for appellant Carless, Ralph Wood & Co.; for appellant Stapley, Percy Bono & Griffith.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

1934.
10 *December.*

JOHN TAYLOR.

Evidence—Character of Prisoner—Series of Questions by Judge on Occupation and History—Previous Convictions thereupon disclosed by Defending Counsel—Conviction Quashed.

Evidence was given that upon the arrest of a prisoner a substantial sum of money in notes was found on him. The prisoner had been previously convicted on several occasions, but the Judge, being unaware of this and with a view to ascertaining what explanation of the possession of these notes the prisoner had to offer, put to him a number of questions with regard to his occupation and history for several years past. At the conclusion of this cross-examination, defending counsel felt that he had no alternative but to inform the jury that the prisoner had been in prison during part of that time. The Judge subsequently warned the jury not to be influenced adversely towards the prisoner by reason of this disclosure.

Held, the trial must be regarded as unsatisfactory and the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on October 12, 1934, of conspiracy to defraud, uttering forged documents and obtaining and attempting to obtain money by forged instruments. He was sentenced by the Common Serjeant (Sir Holman Gregory, K.C., now the Recorder) to three years' penal servitude.

Evidence was given by the prosecution that when the appellant was searched after arrest a substantial sum of money in notes was found upon him. The appellant gave evidence on his own behalf and a number of questions were put to him by the Judge with a view to ascertaining what explanation he had to offer of the possession of this sum of

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JOHN TAYLOR.

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money. The Judge was unaware that the appellant had been previously convicted on several occasions, and asked a number of questions with regard to the appellant's past occupation and history, including the question: "What I want the jury to know is your history for the last ten years." At the conclusion of those questions counsel for the defence said: "In view of the questions your Lordship has been asking, I must put some questions to [the appellant] which I otherwise would not," and asked the following question: "Have you for some part of that ten years been in prison?", to which the appellant replied "Yes." The Judge subsequently told the jury to disregard the disclosure of this fact and in his summing-up said: "Make up your minds to come to a decision wiping that out of your minds altogether."

Arthian Davies, for the appellant:

The questions put by the Judge to the prisoner with regard to his previous history should not have been put. At the conclusion of them the impression left with the jury must have been most unfavourable to the appellant. It must have been obvious that the appellant had something to conceal, and defending counsel felt obliged to inform the jury that the appellant had been previously convicted. The Judge subsequently told the jury to forget about the previous convictions which had come to be disclosed in this unfortunate manner, but the mischief was too serious to be cured.

R. E. Seaton, for the Crown:

When the appellant's previous convictions came to be disclosed in this unfortunate manner, it is perhaps to be regretted that his counsel did not ask for the jury to be discharged.

THE LORD CHIEF JUSTICE: The appellant was convicted at the Central Criminal Court together with two other men

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on October 12, 1934, before the Common Serjeant of that date of conspiracy to defraud, uttering forged documents, and obtaining and attempting to obtain money by forged instruments, knowing them to have been forged. He now appeals against conviction, and the grounds of his appeal are that by reason of improper questions put to him by the Judge it was made to appear to the jury that he was a man of bad character and that a previous conviction was mentioned to the jury.

The matter is in a very high degree unfortunate. The appellant had in fact been in prison on various previous occasions; indeed, he had been released only some few months before this particular trial from serving a term of three years' penal servitude for the crime of forgery. Unhappily, for the sole purpose of ascertaining what explanation the appellant, who had given evidence on his own behalf, had to offer of the fact that a sum of £18 was found upon him, the Common Serjeant, not knowing of the appellant's previous convictions, asked questions of a very wide scope. These culminated in the question: "What I want the jury to know is your history for the last ten years." Nobody had suggested that the sum of £18 found on the appellant had been in his possession for anything like ten years. It may well be that in those circumstances the appellant felt—quite wrongly, of course—that he was being pressed upon the details of his criminal history. One can sympathise with the counsel defending him, who felt that in those circumstances it was inevitable that he should bring out the truth and make a clean breast of it.

It is very unfortunate that a mistake was, quite unwittingly, made in the course of putting questions which, if they had been framed with more particularity, would have been quite proper, but the disastrous result of those questions in the form in which they were put was to cause the fact to become known to the jury that they were trying

a man who had already been in prison. We bear in mind all that was subsequently said in further questions, in the speech of counsel, and in the summing-up, but we cannot avoid the conclusion that in these circumstances, which so accidentally and unfortunately arose, the appellant did not have a satisfactory trial. We have no course but to allow the appeal and quash the conviction.

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Conviction quashed.

Solicitors for the Crown: Wontner & Sons.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACNAGHTEN.

LAWRENCE MARSH.
LESLIE ERNEST BICKERDIKE.
ALEXANDER GLEN.

1935.
5 *February.*

Extension of Time—Considerable Delay—Applications made only after Convictions of Co-Defendants quashed—No Merits such that Appeals would probably succeed—Applications Refused.

Refusal of applications for an extension of time within which to appeal made after considerable delay and only upon the quashing of the convictions of two co-defendants, the Court holding that it was the practice not to grant any considerable extension of time, unless it appeared on the application that there were such merits that the appeal would probably succeed.

Applications for extension of time within which to appeal.

The applicants were convicted at the Central Criminal Court on October 10, 1934, of various offences of obtaining

1935.
5 *February.*

LAWRENCE MARSH.
LESLIE ERNEST BICKERDIKE.
ALEXANDER GLEN.

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money by false pretences and conspiracy to defraud, and were sentenced by the Common Serjeant (Sir Holman Gregory, K.C., now the Recorder), Marsh to eighteen months' imprisonment with hard labour, Bickerdike to twelve months' imprisonment with hard labour, and Glen to four months' imprisonment with hard labour. The applicants were charged together with two men named Carless and Stapley, who were also convicted, but whose convictions were subsequently quashed. (See p. 43, *ante*.)

E. G. Hemmerde, K.C. (*Bernard Gillis* with him), for the applicants:

These applicants were tried together with Carless and Stapley, who were also convicted. This Court subsequently quashed their convictions, and in their judgment commented on various matters in respect of which the indictment and the conduct of the trial were unsatisfactory. It is submitted that the same considerations apply to the present applicants, as much of the evidence relating to them related also to Carless and Stapley. Moreover, a man named Osborne, whom it was originally intended to charge together with these applicants and Carless and Stapley, but whom the police were then unable to find, was subsequently charged and acquitted. It appears, therefore, that there would be substantial merits to be urged in support of the appeal of the present applicants, to the effect that what are alleged to be false pretences made by them were not really false, and on this ground an extension of time is sought. The present applicants did not appeal before owing to lack of funds, as it was felt that, owing to the complexity of the case, the appeals could not be adequately presented to the Court except by counsel.

Eustace Fulton, for the Crown:

There was considerable evidence against all these applicants, which did not apply to the cases of Carless and Stapley.

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MR. JUSTICE AVORY: These applicants were convicted at the Central Criminal Court before the present Recorder of London, together with two men named Carless and Stapley, of obtaining money by false pretences and of conspiracy to defraud. Those convictions took place on October 10, 1934, and they were sentenced, Marsh to eighteen months' imprisonment with hard labour, Bickerdike to twelve months' imprisonment with hard labour, and Glen to four months' imprisonment with hard labour. Carless and Stapley in due course lodged appeals against their convictions, and those appeals came on for hearing before this Court on December 4, 1934. After hearing a full argument, the Court allowed the appeals, and it is all-important in the present case to observe the grounds on which those appeals were allowed. After the judgment of the Court had criticised the form of the indictment, which contained twenty-five counts, and in particular criticised it on the ground that it contained counts charging conspiracy between some of the defendants and other counts charging conspiracy between other of the defendants and so produced great confusion in the hearing of the case, the real ground upon which the appeals were allowed is found in these words: "It is impossible to understand why the four counts upon which these two appellants were convicted should have been left to the jury, when other counts of the same kind had been withdrawn from the jury." It is quite plain that some counts of the indictment relating to Carless and Stapley had, by the direction of the Recorder, been withdrawn from the jury and that they were directed to acquit on those counts. It is manifest that those counts in fact charged offences exactly similar to those charged in the counts upon which Carless and Stapley were convicted. That was the real and substantial ground on which their appeals were allowed. Further, in the course of giving the judgment of the Court, the Lord Chief Justice said: "There was no evidence to support any of the false pretences contained in the counts

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relating to the appellants and it follows, therefore, that there was no evidence upon which the appellants could be convicted on count three, which charged conspiracy." One further ground was referred to in the judgment as a ground for allowing the appeal: "It is unfortunate that in this complicated case the jury were in fact directed that the cross-examination of witnesses on behalf of the appellants was something that they were entitled to ignore."

Those being the grounds on which the appeals of Carless and Stapley were allowed, the question which we have now to consider is whether the present applicants should be granted an extension of time within which to appeal, having regard to the fact that their applications for an extension of time are dated December 14, December 20, and December 21 respectively. It is quite obvious that they are asking for this extension of time and seeking to appeal solely because the appeals of Carless and Stapley have succeeded. Each of the present applicants was in fact represented by counsel at the trial and we are not impressed by the suggestion that they failed to appeal within the proper time by reason of want of funds. They could have appealed to this Court in person, without being represented, as so many convicted persons do, and we should then have had to consider whether there was in their case any ground for allowing their appeals. The first answer to the contention that, because the appeals of Carless and Stapley have succeeded, an extension of time should be granted in the case of the present applicants is that it is quite clear on the evidence that these applicants were engaging in alleged frauds with which Carless and Stapley had nothing to do. Their case might have been tried separately, without Carless and Stapley having been included in the indictment.

In these circumstances, it being the rule and practice of this Court not to grant any considerable extension of time unless we are satisfied upon the application that there are such merits that the appeal would probably succeed, we

are quite unable to say in this case that there was no evidence upon which these applicants could properly be convicted on some, at least, of the counts in this indictment. We, therefore, do not grant the applications for an extension of time.

Applications refused.

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Solicitors for applicant Marsh: Ralph Wood & Co.; for applicants Bickerdike and Glen: R. E. Vaughan Williams.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE MACKINNON AND MR. JUSTICE GREAVES-LORD.

WILLIAM WITHERS.

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Sentence—Unusual Severity—Prevalence of Particular Class of Crime in Locality—Reduction.

Reduction of deterrent sentence of unusual severity passed in view of the prevalence of a particular class of crime in the locality.

Appeal against sentence.

The appellant was convicted at Leicester City Quarter Sessions on January 7, 1935, on two charges of receiving stolen goods and was sentenced by the Recorder to concurrent terms of four years' penal servitude.

The appellant in person.

Douglas Jenkins, for the Crown:

The stolen goods had in each case been stolen from a warehouse. The Recorder came to the conclusion that, as

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there had recently been an extraordinary number of warehousebreakings and housebreakings in the City of Leicester, a deterrent effect was required. [Counsel gave statistics with regard to these crimes for the year 1934.] Further, the appellant was found to be in possession of a large number of keys, and the inference might well be drawn that he was keeping them for unlawful purposes. The sentence was undoubtedly severe, but it is submitted that, in view of the above circumstances, it may well be supported, having regard also to the appellant's record.

MR. JUSTICE MACKINNON: In this case the appellant was tried on an indictment containing two counts charging him with having received stolen property well knowing it to have been stolen. The actual property concerned was of very small value. In the first count the charge related to a raincoat and three fourpenny insurance stamps, and in the second count to three keys. These articles were undoubtedly stolen out of warehouses which had been broken into. Having regard to the value of the stolen property, it would appear that the sentence was a very severe one. We have been told that there had been a considerable amount of warehousebreaking in Leicester at that time and that it was the policy of the Recorder to impose a sentence which might act as a deterrent to those who commit that class of crime. That is a proper consideration so long as it does not result in a convicted man being made the scapegoat of other people who have committed similar crimes but have not been caught and convicted. We must also take into account the appellant's own record. It is true that he had been convicted five times previously. On two occasions he was bound over, then he was sentenced to three months' imprisonment, and in June, 1931, he was convicted of possessing moulds for making counterfeit coins and sentenced to nine months' imprisonment. Finally, he was sentenced to nine months' imprisonment for factory-

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breaking in January, 1933. From that sentence he would presumably have been released some time in the autumn of 1933, and more than a year, therefore, had elapsed since his release when he was again convicted. Taking all these matters into account, this Court is of opinion that the sentence was excessive and that it should be reduced to a sentence of eighteen months' imprisonment with hard labour.

Sentence reduced.

Solicitor for the Crown : C. Leslie Hale, Leicester.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE MACKINNON AND MR. JUSTICE GREAVES-LORD.

JAMES ROBERT VENT.

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Murder—Plea of Guilty—Prisoner interviewed by Counsel at Request of Judge—Evidence by Prison Medical Officer of Prisoner's Fitness to Plead—No necessity to Empanel Jury.

On a plea of guilty to a charge of murder, the Judge asked counsel to interview the prisoner and explain the position to him. After interviewing the prisoner, counsel told the Judge that the question had occurred to him whether the prisoner was fit to plead to the indictment. The senior medical officer of the prison where the prisoner had been in custody was called, and said that he saw no reason to depart from the view he had put forward in a report (which was before the Judge) and that the prisoner was, in his opinion, fit to plead. The indictment was again put to the prisoner, and he again pleaded guilty, and was sentenced to death.

Held, the procedure followed was perfectly proper and

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there was, in the circumstances, no necessity to empanel a jury to try the issue whether the prisoner was or was not fit to plead.

Appeal against conviction.

The appellant at the Central Criminal Court on February 14, 1935, pleaded guilty to murder, and was sentenced by Talbot, J., to death.

When the appellant pleaded guilty, the Judge asked one of the counsel who were present in Court to interview the appellant and explain the position to him. Counsel did so and informed the Judge that he had entirely failed to get any coherent statement from the appellant, and that the question had occurred to him whether the appellant was fit to plead to the indictment. The Judge, who had before him a report from the senior medical officer of Brixton Prison, said that he desired to hear the officer's evidence. He was accordingly sworn, and said that he saw no reason to depart from the view which he had put forward in his report, and that the appellant was, in his opinion, fit to plead. Counsel then took no further part in the trial, the indictment was again put to the appellant, and he again pleaded guilty.

E. A. Hawke, for the appellant:

The only question is whether the appellant's plea was entirely satisfactory, having regard to the nature of the charge. The Court may think that, in all the circumstances, it would have been more desirable that the issue whether the appellant was in a fit state of mind to plead to the indictment should have been tried by a jury. It is submitted that the Court might make an order in the nature of a *venire de novo* and send the case back for the appellant to plead again, if the Court has power to do so. Such a procedure was followed in BAKER, [1911] 7 Cr. App. Rep. 207 and other cases, though it is true that in all those cases there had been a misunderstanding, or a doubt whether a

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plea of guilty had ever been intended. It is also suggested that the Court might hear further medical evidence on the issue of the appellant's fitness to plead.

[AVORY, J.: The question is whether he was fit to plead at the time of his arraignment.]

Eustace Fulton, for the Crown:

The Judge's reason for asking counsel to interview the appellant was, doubtless, a desire that he should have some guidance as to the gravity of his plea. Before ordering a jury to be sworn to try the issue whether a prisoner is fit to plead, a Court must be satisfied that there is some material for the supposition that he is unfit to plead. Here there was no reason why a jury should have been empanelled to try that issue; the Judge had before him the report of the senior medical officer of Brixton Prison, and had heard his evidence.

MR. JUSTICE AVORY: This appellant pleaded guilty at the Central Criminal Court to the murder of Clementina Balchin and was sentenced to death. When first arraigned he unequivocally pleaded guilty, and the learned Judge then requested Mr. Hawke, to whom we are indebted for telling us what took place, to see the prisoner and explain to him what the position was and the consequences which would necessarily follow his plea of guilty. Counsel then saw the prisoner and explained the situation to him, and informed the learned Judge of the result of the interview. Thereupon the medical officer of the prison where the appellant had been confined was called and gave evidence as to the conclusion which he had formed with regard to the appellant's ability to understand the nature of the charge, to put forward any defence which was open to him, and to call evidence. The medical officer said that he was satisfied that the appellant was sufficiently sane to understand the nature of the charge and in a position to follow it, to know whether he wished to be represented or not, and to

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appreciate the nature of his own plea and the consequences following from it. Thereupon the appellant was again arraigned and asked whether he wished to plead guilty or not guilty, and he again unequivocally pleaded guilty.

In those circumstances it appears to us that there was no sufficient reason for any jury being empanelled to try the issue whether the appellant was fit to plead. It is only in a case where there is some reason to doubt whether an accused person appreciates the nature of his confession or the consequences resulting from it that a jury is empanelled to try that issue. In this case we can see no ground for saying that any course could have been pursued other than that which was pursued, particularly in view of the evidence of the appellant's own statement to the police which was before the Court. [His Lordship then read certain passages from that statement and from the grounds of appeal which the appellant himself had submitted, and continued:] The appellant gave a full account of the manner in which the crime had been committed and he ascribed the reason for it to a cause which is not uncommon in crimes of this nature, namely jealousy of the murdered woman's conduct with regard to other men.

In these circumstances, if there is any ground for further consideration of the appellant's state of mind, that is a matter for consideration by the proper authority. We cannot investigate that question further than it has already been investigated. In the result all this Court can do is to say that this appeal must be dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE LAWRENCE AND MR. JUSTICE GREAVES-LORD.

WALTER HENRY PORTER.

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False Pretences—Evidence—Business alleged not to be Genuine —Questions in Cross-examination on previous similar Business which had resulted in Conviction—Admissibility.

The appellant was charged with obtaining money by false pretences, the allegation of the prosecution being that a certain business carried on by him had falsely been represented to be a *bona fide* association honestly carried on and in a position to offer advantages in return for the subscriptions of members. The appellant had carried on in 1930 a similar business and had made representations similar to those made in the present case and had, as a result, been convicted of obtaining money by false pretences. He was asked in cross-examination a number of questions about the previous business, but no reference was made by the prosecution to that business having resulted in any charge or conviction.

Held, as there was sufficient nexus in method and circumstance between the two businesses, the cross-examination on the previous business was admissible.

BOND, [1906] 2 K. B. 389 followed and applied.

Appeal against conviction and application for leave to appeal against sentence.

The appellant was convicted at Essex Assizes on February 5, 1935, of obtaining moneys by false pretences and was sentenced by the Commissioner (now Mr. Justice Hilbery) to two years' imprisonment.

The appellant, who had carried on a business under the name of Approved Hotels, Cafés and Restaurants of Great Britain, was charged, in substance, with falsely representing that the above was a *bona fide* association honestly carried on and that the association was then in a position

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to offer advantages in return for subscriptions of members. The main contention of the defendant was that he had no intent to defraud. He did not dispute that the persons alleged to have been defrauded had been induced to part with their money by reason of the above representations. The appellant had carried on a similar business in 1930 and had obtained money by representations similar to those made in the present case. As a result, he was tried and convicted at the Central Criminal Court in 1931 for obtaining money by false pretences. He was asked in cross-examination a number of questions with regard to the previous similar business carried on by him, but counsel for the prosecution refrained from making any reference to any previous charge or conviction.

Frank Milton, for the appellant:

The only ground of appeal on which reliance is placed is with regard to the admissibility of certain questions put to the appellant in cross-examination with regard to a certain previous venture in a similar business. As a result of that venture the appellant was convicted of obtaining money by false pretences. The previous conviction was not specifically put to the appellant, but it is submitted that the questions which were put tended to show that the appellant had committed a previous offence and accordingly offended against the proviso to section 1 (f) of the Criminal Evidence Act, 1898. The questions are alleged to be admissible on two grounds—first, that it was permissible to introduce evidence of system; secondly, that it was permissible to show that, as the appellant had been engaged on a similar previous venture which had failed, he must have known that he had no prospect of success in the second venture. There was, however, a period of about two-and-a-half years between the end of the first venture and the beginning of the second, and it is submitted that, as the interval of time was so great, there was no sufficient nexus

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between the two transactions. There must be some limit in point of time: for example, there could not be any nexus between two transactions separated by a period of fifty years. Further, there cannot be a system founded on two transactions only. [He referred to ELLIS, 5 Cr. App. R. 41; [1910] 2 K. B. 746; BOND, [1906] 2 K. B. 389; and PERKINS *v.* JEFFERY, [1915] 2 K. B. 702.] The learned Commissioner appears to have relied on FRANCIS (1874), L. R. 2 C. C. R. 128 and the fact that there was a similarity between the two sets of alleged false pretences, but it is submitted that that case does not apply in the present case. RHODES, [1899] 1 Q. B. 77, where evidence of subsequent similar false pretences was admitted, is distinguishable on the ground that there all the transactions were part of one bogus business. If the evidence was not admissible as evidence of system, to introduce it in order to rebut a defence open to the prisoner would create a very anomalous and undesirable principle. Further, it did not really rebut any defence at all, but merely went to show that the prisoner had previously committed a criminal offence.

G. B. McClure, for the Crown:

The whole issue in this case was whether there was an intent to defraud, and the questions complained of were relevant in that they went to rebut the defence of honest optimism. It was material to show that the same kind of venture had been tried before with certain differences which ought to have impressed upon the appellant the hopelessness of attempting any honest business on the same lines on a second occasion. With regard to evidence of system, it depends on the type of case whether a difference in point of time between the transactions really matters. [He referred to WILKS (1914), 10 Cr. App. R. 16.]

Frank Milton replied.

MR. JUSTICE AVORY: This appellant was convicted at Essex Assizes on an indictment which charged him with

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obtaining moneys by false pretences, the false pretences alleged being " that Approved Hotels, Cafés and Restaurants of Great Britain was a *bona fide* association honestly carried on for the purpose of selecting and approving certain hotels, cafés and restaurants; that the said association was then in a position to offer advantages in return for subscriptions of members and had issued a motorists' handbook in which were published the names of certain approved hotels, cafés and restaurants, and had certain descriptive signs to be sent to and exhibited by any approved hotel, café, or restaurant." There was no substantial dispute that the defendant in fact made the representations alleged. He called himself " Approved Hotels, Cafés and Restaurants ", representing that to be a *bona fide* association, and used that high-sounding title which was calculated to impress those from whom he obtained subscriptions much more than if he had used his own name. There was no dispute that the persons alleged to have been defrauded were induced to part with their moneys by means of the above representations. In those circumstances there were two questions for the jury: (i) whether the defendant knew that the pretences which he was putting forward were false; (ii) whether he intended to defraud. If the jury came to the conclusion that he knew that the pretences were false, they would be entitled to infer the intent to defraud. The main contention of the defendant was that he had no intent to defraud.

Those being the issues at the trial, it was sought on the part of the prosecution to put questions in cross-examination to the appellant to show that in 1930 he had carried on a business which, as Mr. Milton was forced to admit, was remarkably similar to the one which was the subject of the present indictment. There were differences, no doubt; in the former case there was a false pretence that a certain sign used by the defendant represented him to be a member of some recognised association, but it was not disputed that in the general outline the nature of that business and the manner

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in which he obtained subscriptions were remarkably similar to those employed in the present case. The question was argued in the absence of the jury whether this evidence was admissible and the learned Commissioner ruled that it was. Thereupon questions were put to the appellant by Mr. McClure for the prosecution as to the nature of that previous business and as to the issue whether, in the result, it had not become obvious that the appellant could not honestly and successfully carry on such a business and that it must end, as it did, in failure. Unfortunately the appellant, not content with answering the questions put to him, himself introduced before the jury the fact that he had been convicted of obtaining money by false pretences in 1931. The prosecution are not responsible for that.

The only question which we have to consider is whether it was admissible to elicit the fact that in 1930 the appellant had carried on a very similar business and made very similar false pretences and that he must have known from his experience that the subsequent carrying on of such a business would result not only in the failure of the business, but also in the subscribers being defrauded of their money. We have to consider the authorities which have been so ably put before us by Mr. Milton. They are numerous and each one has to be considered with reference to its facts, but there are some passages which appear to lay down principles which ought to guide us in this case. In ELLIS, Bray, J., in giving the judgment of this Court, of which the other members were Lord Alverstone, C.J., Jelf, J., A. T. Lawrence, J., and Lord Coleridge, J., said (5 Cr. App. R., at p. 58, [1910] 2 K. B., at p. 760): "In other words, could evidence of those frauds have been given by the prosecution? It was argued by Mr. Bodkin that the judgments in BOND (*supra*) supported his proposition. We think they show the contrary. In his judgment Lord Alverstone, C.J., said: 'The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory

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enactments, evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence on which it is proved. . . . In our opinion the law on this subject is laid down with perfect accuracy by Channell, J., in FISHER (3 Cr. App. R. 176; [1910] 1 K. B. 149). He said, in delivering the judgment of the Court of Criminal Appeal (Lord Alverstone, C.J., Channell, J., and Lord Coleridge, J.): 'In other words, whenever it can be shown that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake or in order to show the existence of a systematic course of fraud.'" In PERKINS *v.* JEFFERY ([1915] 2 K. B. 702, at p. 708) there is a quotation from the judgment of Lord Reading, C.J., in BOYLE AND MERCHANT, where he said (10 Cr. App. R. 180, at p. 193; [1914] 3 K. B. 339, at p. 347): "We think that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged. There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to show generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to show that he had a fraudulent or dishonest mind in the particular transaction the subject-matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connection between the act charged and the facts relating to previous

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or subsequent transactions which it is sought to give in evidence to make such evidence admissible." It is really the question of nexus between the offence which is the subject of inquiry and the previous offence which has formed the basis of Mr. McClure's argument. Before dealing specifically with that question, I will read a short passage from the judgment of Cresswell, J., in COOPER (3 Cox C. C. 547), where he said, at p. 549: "The evidence is not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question is, whether on this occasion he did an act with the design of effecting a certain object. One step in the proof is to show that he would be likely to know that a certain result would follow." The question in this case is whether it was not obvious that the appellant, from his experience of the previous venture in 1930, would be likely to know that a certain result would follow, namely that the subscribers would be defrauded.

It is said here that there is a considerable interval of time between the two transactions, something like two years. We need not consider the hypothetical case which was put to us in argument of a transaction which took place fifty years before. In this case the time which elapsed was only about sufficient for the previous conviction to have blown over. It would have been idle to suppose that the appellant the moment when he came out of prison could have started again the same kind of fraud. We are therefore not impressed by the fact that two years had elapsed, but the question of time is not the only means of establishing a nexus between the one offence and the other. A. T. Lawrence, J., as he then was, in giving judgment in BOND (*supra*), at p. 424, said: "In all cases in order to make evidence of this class admissible there must be some connection between the facts of the crime charged in the indictment and the facts proved in evidence. In proximity of time, in method, or in circumstance there must be a nexus between

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the two sets of facts, otherwise no inference can be safely deduced therefrom." In this case we are clearly of opinion that, apart from the question of time, there was the necessary nexus in method and in circumstance to justify the admission of this evidence and that therefore this appeal fails.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

1935. 14 *May.*

NATHAN BERKOFSKY.

Outstanding Charges—Basis of taking into consideration—Prisoner to be told specifically of necessity of admitting Truth.

Where a prisoner asks for outstanding charges to be taken into consideration in a sentence to be passed upon him, the presiding Judge should make it clear that this can be done only if the prisoner admits the truth of those charges.

Appeal against conviction, and application for leave to appeal against sentence.

The appellant was convicted at Leicestershire Sessions on April 2, 1935, of receiving stolen property, and was sentenced by the Chairman to three years' penal servitude.

After verdict, the appellant, by his counsel, expressed the desire that two outstanding charges should be taken into consideration in the sentence, but he was not specifically asked by the Court whether he admitted the truth of those

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charges. It is unnecessary to set out the facts of the case, which is reported solely on the practice to be followed in taking outstanding charges into consideration.

A. M. Lyons, K.C. (*R. T. Paget* with him), for the appellant, submitted that the summing-up was in various respects unsatisfactory.

J. P. Stimson, for the Crown, submitted that, though the summing-up could not be supported, the case was one where the Court might apply the proviso to section 4 of the Criminal Appeal Act, 1907.

HUMPHREYS, J. [after stating that the summing-up was in a number of respects unsatisfactory and that the case was not one where the Court ought to apply the proviso to section 4 of the Criminal Appeal Act, 1907:] There is one other matter to which reference should be made. It appears that, after the jury had returned a verdict of guilty, the Chairman was informed that there were two outstanding charges, and according to the shorthand note the superintendent of police said: "The difficulty is as to whether counsel will agree to having these taken into account and dealt with to-day". After some consultation, counsel for the prisoner said: "I have no objection". The charges, which were charges in the one case of stealing and in the other case of receiving stolen goods, were then stated in detail, and the Clerk of the Court said: "Do you wish those cases to be taken into consideration when the magistrates are dealing with the other matter to-day?" and the prisoner replied: "Yes".

Mr. Lyons has said quite accurately that there is nothing in the shorthand note to show that the prisoner intended to admit the truth of those charges, and he has intimated that the prisoner did not intend to do so.

With regard to the general practice in this matter, the Court desires to say that charges other than those contained

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in the indictment can never be taken into consideration by a Court in sentencing a prisoner unless the prisoner admits the truth of those charges, and it is desirable that the presiding Judge in any Court, before passing sentence, should make it clear to the prisoner that, if he asks that outstanding charges may be taken into consideration, he is to be taken to admit the truth of those charges and to plead guilty to them. As the Court is told in the present case that the appellant did not intend to admit the truth of the outstanding charges, it will be for the prosecution to decide whether they wish to proceed on those charges or either of them. The Court gives no direction on that matter. [His Lordship concluded by saying that by reason of the matters referred to in connection with the summing-up the conviction must be quashed.]

Conviction quashed.

Solicitors for the appellant: Martin & German, Nottingham; for the Crown: L. E. Rumsey, Leicester.

JOHN EDWARD FREEBODY.

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Indecent Assault—Adult—Corroboration—Proper Direction to Jury.

On a charge of indecent assault or any sexual offence, even though the person against whom the offence is alleged to have been committed be an adult and not a child of tender years, the jury should be directed that it is not safe to convict upon the uncorroborated testimony of the complainant, but that, if they are satisfied of the truth of the complainant's evidence, they may, after paying attention to that warning, nevertheless convict.

T. J. JONES (1925), 19 Cr. App. R. 40, followed and applied.

Appeal against conviction.

The appellant was convicted at Durham Assizes on March 12, 1935, of indecent assault on a woman aged twenty-five and was sentenced by Mr. Justice Goddard to twelve months' imprisonment.

Norman Harper, for the appellant:

The summing-up was unsatisfactory in that it gave no adequate direction on onus of proof, and further in that it gave no direction on the question of corroboration. This being a sexual case, corroboration was required in practice, though not as a matter of strict law, and a direction of the nature referred to in T. J. JONES (1925), 19 Cr. App. R. 40, at p. 41 was required. [He referred also to KILLICK (1924), 18 Cr. App. R. 120.] There was in fact no corroboration of the evidence of the prosecutrix, which made it all the more essential that the jury should be warned of the danger of acting on her uncorroborated evidence and that they should be told that there was in fact no corroboration: PARKER (1924), 18 Cr. App. R. 103. Further, the verdict was unsatisfactory, and cannot be supported, having regard to the evidence.

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D. H. Robson, for the Crown:

It is conceded that the summing-up failed to give the jury the usual warning with regard to corroboration, but throughout the summing-up there were numerous warnings to take great care before convicting on the evidence before them. Further, there was in fact some slight corroboration of the evidence of the prosecutrix.

THE LORD CHIEF JUSTICE: This appellant was charged at Durham Assizes upon an indictment containing two counts. The first count charged him with assault with intent to commit rape and the second with indecent assault on the same woman on the same day. In the result the appellant was found guilty of indecent assault and was sentenced to twelve months' imprisonment. He now appeals against conviction.

It is not necessary to repeat the facts of the case which have been very carefully stated by Mr. Harper. The appellant, who was a police constable, was on duty on January 23 in a certain street, and about 6.40 p.m. he entered a certain office and there found a young woman, twenty-five years of age, who had been working at a typewriter. It was alleged that after conversing with her for some time he committed an indecent assault upon her.

It is enough to say that, in the opinion of this Court, the summing-up, although that of a very careful and punctilious Judge, omitted to give the necessary direction on the important topic of corroboration. The proper direction in a case where the offence charged is a sexual offence, although the prosecutrix is not a mere child, is the direction referred to ten years ago in T. J. JONES (1925), 19 Cr. App. R. 40, at p. 41: "The proper direction in such a case is that it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury, if they are satisfied of the truth of her evidence, may, after paying attention to that warning, nevertheless convict." In this

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case there was no corroboration of the kind required. The evidence of the young woman alleged to have been assaulted was not strengthened in any material particular by evidence from other sources implicating the accused man. Notwithstanding the fact that there was no corroboration, the Judge, who was evidently leaning to the side of an acquittal, somehow by an oversight omitted to give to the jury any warning such as is required in cases of this kind as to the temper in which they should approach the evidence and to the effect that, though they were entitled to convict on the uncorroborated evidence of the prosecutrix, in the eye of the law such a course is not safe. It seems to the Court that for this reason the conviction cannot be sustained.

Further, it is doubtful whether there was a sufficient direction on the burden of proof. [His Lordship referred to certain passages in the summing-up, and continued:] That, however, is not the matter of importance here. On the ground already stated the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitor for appellant: F. J. Lambert, Gateshead.

[In the House of Lords.]

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Coram: The LORD CHANCELLOR, The LORD CHIEF JUSTICE, LORD ATKIN, LORD TOMLIN and LORD WRIGHT.

Murder—Burden of Proof—Defence of Accident—Proper Direction to Jury—Reasonable Doubt.

The appellant was charged with the murder of his wife, and put forward the defence that the killing had been due to an accident. The summing-up of the Judge contained the following passage: "If the Crown satisfy you that this woman died at the prisoner's hands, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime, so that it is only manslaughter, or which excuse the homicide altogether by showing it was a pure accident."

Held, reversing the decision of the Court of Criminal Appeal, that the above statement amounted to a misdirection on the burden of proof. The burden of establishing his defence rests on the prisoner only where the defence is one of insanity, and in certain cases specifically provided for by statute. There is no principle of law that on a charge of murder, once the killing has been proved, circumstances of accident must be proved by the prisoner, unless they arise out of the evidence produced against him. On a charge of murder, the Crown must prove that death occurred as the result of a voluntary act on the part of the prisoner, and malice, express or implied, on the part of the prisoner; but if, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the Crown or the prisoner, whether the prisoner killed the deceased with a malicious intention, the Crown have not made out their case and the prisoner is entitled to an acquittal.

Greenacre (1837) (8 Car. & P. 35) commented on and doubted.

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In proper circumstances the proviso to section 4 of the Criminal Appeal Act, 1907, may be applied in a capital case, as in any other case.

Appeal by the prisoner from order of the Court of Criminal Appeal dismissing his appeal against conviction.

The appellant, Reginald Woolmington, was convicted at Bristol Assizes on February 14, 1935, before Mr. Justice Swift of the murder of his wife and was sentenced to death. At a previous trial at Taunton Assizes on January 23, 1935, before Mr. Justice Finlay the jury had disagreed.

The appellant married his wife, who was aged seventeen, on August 25, 1934. A baby was born on October 14 and soon afterwards they began quarrelling. On November 22 the appellant's wife left him and went to her mother's house, and refused to return, though the appellant on several occasions tried to persuade her to do so. On December 10 the appellant went to see his wife, taking with him an old double-barrelled shot gun, the barrels of which he had sawn off. They were alone in the house and after a little time a shot was heard. The appellant cycled away at once, and told his mother and his employer that he had shot his wife. At the trial he gave evidence to the effect that he never intended to injure his wife, and that, as his previous efforts to induce her to return had failed, it occurred to him that if he threatened to kill himself in her presence it would bring her to her senses. He said that he had no intention of firing the gun and did not know how it went off. The further relevant details of the evidence and the material portions of the summing-up appear in the judgments of the Court of Criminal Appeal and of the House of Lords.

The appellant appealed to the Court of Criminal Appeal —Mr. Justice Avory, Mr. Justice Lawrence and Mr. Justice Greaves-Lord—who heard the appeal on March 18, 1935.

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J. D. Casswell, for the appellant:

The Judge misdirected, or failed to direct, the jury on the question of onus of proof. He told them that, once killing had been proved, the burden was on the defence to show that the killing was accidental. He should, however, have told them that if the prisoner gave an explanation of how the killing took place, it was not necessary that the jury should be convinced by it, and that if, after hearing the prisoner's explanation, they were left in a reasonable doubt on the whole of the evidence, they should acquit. [He referred to *Roscoe's Criminal Evidence*, (15th ed.), p. 300; STODDART (1909), 2 Cr. App. R. 217, at p. 241; SCHAMA and ABRAMOVITCH (1914), 11 Cr. App. R. 45; GRINBERG (1917), 12 Cr. App. R. 259; HAGEN (1913), 9 Cr. App. R. 25.]

J. G. Trapnell, K.C. (*R. Knight* with him), for the Crown:

The Judge's direction that, once the killing was established, the onus was on the prisoner to show that it was accidental was perfectly correct and in accordance with the older authorities. [He referred to *Foster's Crown Law* (3rd ed.), p. 255; *Blackstone's Commentaries*, Vol. 4, p. 201; and *East's Pleas of the Crown*, p. 224.] It is true that there was no express statement in the summing-up that if the explanation given by the prisoner left a doubt in the minds of the jury the prisoner was entitled to the benefit of that doubt. Such a direction is appropriate on a charge of receiving stolen goods, but that is a class of case entirely different from murder. The presence of the stolen goods in the prisoner's possession is not of itself sufficient to make a complete *prima facie* case; a further ingredient of proof is required, namely knowledge that the goods were stolen. On a charge of murder, once a definite act is established against the prisoner, the onus is on him to excuse the act. Regard must be had to the nature of the presumption in cases of murder and in other cases.

In any event, it is submitted that, if there was any error in the summing-up, in view of the evidence at the trial, this is a case where the Court might apply the proviso to section 4 of the Criminal Appeal Act, 1907. [He was stopped.]

J. D. Casswell, in reply:

Even where a *prima facie* case has been made out by the prosecution, the proper direction to the jury is that they may, not that they must, convict.

AVORY, J.: The appellant, Reginald Woolmington, was convicted at the Bristol Assizes of the murder of his wife on December 10 of last year. We do not think that we ought to take any notice of the fact that at a previous trial a jury had disagreed. It is quite impossible for this Court even to conjecture what may have been the reasons actuating some of the jurors in the previous case, who announced that they would not agree to any verdict.

The appellant had the advantage of being represented at the trial by Mr. Casswell, who gave his services to the appellant under the Poor Prisoners' Defence Act, 1930, for which the appellant himself ought to be grateful, and Mr. Casswell has further given to the Court an elaborate argument in favour of the view that there was some misdirection or non-direction in this case by the learned Judge, which ought to justify this Court in allowing this appeal.

The point, and really the only point, of complaint as regards this summing-up is that the learned Judge did not anywhere use the expression that the jury should acquit the accused altogether or convict him only of manslaughter if they entertained any reasonable doubt about the truth of his explanation of how his wife came by her death. It may be that it would have been better if the learned Judge had in those few words said to the jury that, if they entertained reasonable doubt whether they could accept his explanation, they should either acquit him altogether

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or convict him of manslaughter only. We have to consider in every case where objection is taken to a summing-up, whether, even if the error which is called a non-direction had not taken place, the jury would inevitably have come to the same conclusion to which they came. The proviso to section 4 of the Criminal Appeal Act was especially designed to meet a case where there has been some slip in the trial, from which no miscarriage of justice can possibly have taken place. In that view we have to consider the facts of this particular case.

There can be no question, to start with, that the learned Judge laid down the law applicable to a case of murder in the way in which it is to be found in the old authorities: "The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. In every charge of murder, the fact of the killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law will presume that the attack would be founded in malice unless the contrary be shown". No doubt there is ample authority for that statement of the law.

In this case we have to consider whether the explanation which the accused gave of the manner in which his wife met with her death was one which, in the circumstances and in view of the evidence, could possibly be accepted by a reasonable jury. That explanation was, in substance, that the gun went off by accident; that he had no intention either of killing his wife, or of wounding her, or of terrifying her by any threat that he would shoot himself, but that it was an accident, a result of his shifting the gun from his shoulder across his chest, and that by some accident the trigger got caught and the gun went off without any intention on his part of discharging it. That was the

explanation which he gave. We have to consider whether any reasonable jury could possibly accept that explanation, in view of the conduct of the appellant both before the wife was killed and after she was killed.

There is no dispute that there had been quarrels between the appellant and his wife. There was evidence that as late as November 20 the appellant was heard to say to his wife: "If you go back to your mother I will strangle you when you come back". There was evidence that on the morning of December 10 the appellant went to the house where his wife was living and took with him a double-barrelled gun, having previously sawn off the barrels so as to make it convenient to carry it without it being observed that he was carrying a gun, in other words, so that he might conceal it under his coat. With that gun loaded in both barrels with the only cartridges which were available—two which were left in the box—he proceeded to the house where his wife was, and, according to the evidence of a neighbour, was heard speaking to his wife and saying to her: "Are you coming back or not?" and, soon after he was heard to say that, a gunshot was heard. Then what happened? There can be no question but that that gunshot which was heard was from the gun which the appellant was carrying, and that the deceased woman had been shot over the region of the heart with the gun at about a distance of a yard from her, and that she died instantaneously.

What was the appellant's conduct? When he saw her lying on the floor he must have assumed that she was either dead or dying. He leaves the house, taking the gun with him, rides away on his bicycle, and the next thing we know is that he sees his employer, a farmer, and says to him: "I shall not be coming to work any more". When he was asked: "What do you mean by that?" he said: "I have shot my wife", and when asked how he did it, he replied: "With that old gun out in the barn", and he went on to say that he had cut it short, and he concluded

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by saying: "They will be after me now". Later that morning he saw his mother and he said to her: "I leave everything to Bill. I have shot Violet"; and later in the pocket of his coat was found a letter in which he had written: "Goodbye all. It is agonies to carry on any longer. I have kept true hoping she would return. This is the only way out. They ruined me and I'll have my revenge. May God forgive me for doing this, but it is the best thing. Ask Jess to call for the money paid on motor bike (Wednesday). Her mother is no good on this earth, but have no more cartridges, only two, one for her and one for me. I am of a sound mind now. Forgive me for all trouble caused. Goodbye all. I love Violet with all my heart". There is the significant statement that he had no more cartridges than the two, in conjunction with his observation that her mother was no good on this earth. When he was arrested he said in answer to the charge: "I want to say nothing except I done it and they can do what they like with me. It was jealousy, I suppose. Her mother enticed her away from me. I done all I could to get her back; that's all". He admitted, when he gave evidence and was cross-examined, that neither to his own mother nor to his employer, the farmer, nor to anybody did he ever suggest that this gun had gone off by accident. On the contrary, everything he said and did after the occurrence indicated that there was no ground whatever for the defence which was put forward for him at the trial that the gun had gone off by accident.

In those circumstances we have come to the conclusion that, even without the expression which it is suggested has been omitted, the whole effect of the summing-up was to leave it open to the jury to say whether they could possibly in the circumstances accept the theory that this gun had gone off by accident, or whether they could accept any theory which would reduce the crime from murder to manslaughter. We have come to the conclusion that, even

if any such warning had been given to the jury about a reasonable doubt as is said to have been omitted, they must in the circumstances of this case have inevitably come to the conclusion that the appellant was guilty of the crime of murder.

In these circumstances we must dismiss this appeal.

The prisoner appealed to the House of Lords under a fiat given by the Attorney-General.

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T. J. O'Connor, K.C., for the appellant:

The Judge misdirected the jury in telling them that the onus of proving that the shooting was accidental was on the defence. [He referred to ONEBY (1726), 17 St. Tr. 29; MACKALLEY (1611), 9 Coke 65 b, and MAWGRIDGE (1706), 17 St. Tr. 57.] Intention is the essence of the crime of murder, and the burden is not on the prisoner to disprove the intent which the Crown alleges, but is on the Crown to establish what the intent was. The bare statement of Swift, J., that the fact of death having occurred was sufficient did not go far enough. All the earlier authorities show that it is necessary to analyse and inquire into the state of mind of the person alleged to have committed the crime, and find whether there was malice prepense. The Crown must satisfy the Court that there was malice prepense. Over the whole range of criminal law the test as to the burden of proof is now quite different from the test applied by Swift, J., in this case. [He referred to *Hale's Pleas of the Crown*, ch. 33, pp. 424, 432; ch. 37; 4 *Blackstone's Commentaries*, 200; and *Hawkins' Pleas of the Crown* (8th ed.), Book 1, ch. 13, sects. 18, 32; *Stephen's Digest of Criminal Law* (7th ed.), Art. 322, p. 235; and *Foster's Crown Law*, (3rd. ed.), p. 255. He also cited LAWRENCE, [1933] A. C. 699, at p. 706, and DAVIES (1913), 8 Cr. App. R. 211.] The last-mentioned case is very similar to the present, and the conviction was there quashed.

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STODDART (1909), 2 Cr. App. R. 217, is perhaps the principal authority with regard to the modern view. In LAWRENCE it was stated in the judgment of the Board ([1933] A. C., at p. 706): "A more important objection is that throughout the Judge's charge he did not give the jury any direction at all as to the onus of proof, or that the accused was entitled to the benefit of a reasonable doubt. . . . The true direction would be that the onus was always on the Crown."

[He also referred to AUBREY (1915), 11 Cr. App. R. 182; SANDERS (1919), 14 Cr. App. R. 11; HAGEN (1913), 9 Cr. App. R. 25; STURGESS (1913), 9 Cr. App. R. 120; BRAIN (1918), 13 Cr. App. R. 197; WHITE (1865), 4 F. & F. 383; and GREENACRE (1837), 8 Car. & P. 35.]

[The LORD CHANCELLOR referred to *Halsbury's Laws of England* (2nd ed.), Vol. 9, para. 731, p. 426, where it is stated: "When it has been proved that one person's death has been caused by another, there is a *prima facie* presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder."; and said that the authority in support of that proposition was GREENACRE (*supra*), where Tindal, C.J., in his summing-up, said: "There are several principles of law relating to this subject, one of which is perfectly clear—*viz.*, that where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder."]

That appears to be wrong. Once a Judge has said that the burden rests on the accused the whole of the rest of his summing-up is vitiated.

The submissions made on behalf of the appellant may

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be summarised as follows: "(1) The Crown must prove (*a*) death as the result of a voluntary act of the accused, and (*b*) malice of the accused. (2) It may prove malice (*a*) expressly, or (*b*) by implication. Malice may be implied where death occurs as the result of a voluntary act of the accused which is (*a*) intentional, and (*b*) unprovoked. (3) When death and malice have been proved the Crown has made a *prima facie* case of murder. (4) The accused is then called on to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. (5) If the jury are either satisfied with his explanation or on a review of all the evidence are left in reasonable doubt whether, even if his explanation be untrue, the act was intentional and unprovoked, they must acquit."

J. D. Casswell, following for the appellant:

The Judge in his direction relied chiefly on the passage in *Foster's Crown Law* (3rd ed.), p. 255, which he quoted verbatim. That passage is not part of a judgment, and Sir Michael Foster's statement has no greater authority than that of an eminent writer of a text-book. The case quoted in the margin (ONEBY, *supra*) does not in fact support the statement in the text, nor does the case relied on in ONEBY (LEGG (1674), Sir J. Kelyng's Rep. 27). The ultimate authority relied upon in all these cases is 9 Co. Rep. 65 b. In those cases and in the passage referred to in Coke the killing was admittedly voluntary and not accidental. Sir Michael Foster's meaning has probably been misinterpreted, for the passage continues with words showing that he did not consider that, as regards the proof necessary, murder differs from any other crime.

J. G. Trapnell, K.C. (*Reginald Knight* with him), for the Crown:

All the Crown had to prove was an intentional killing,

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and all that was stated by the Judge in the summing-up in this case was that the malice was to be presumed from the killing. The primary question is whether the Judge was right in giving that direction.

The law was rightly laid down by Swift, J. When the prosecution has proved a killing by a person, then the onus is on that person to show that his act did not amount to murder. There could have been no objection to the summing-up if the Judge at some stage had said: "Remember always, if the whole of the evidence leaves a doubt in your minds, that then you are entitled to resolve that doubt in favour of the accused."

The true principle of law is that once a killing is proved the presumption of malice which arises shows that the act must be regarded as an intentional act without lawful excuse, unless the circumstances of the case or the evidence of the accused person alleviates the offence and makes it out to be something less than murder. [He referred to MALONEY (1861), 9 Cox C. C. 6; EAGLE (1861), 2 F. & F. 827; CAVENDISH (1873), Ir. Rep. 8 C. L. 178; BAXTER (1913), 9 Cr. App. R. 60; and GORGES (1915), 11 Cr. App. R. 259, at pp. 263, 265; *Archbold's Criminal Pleading* (29th ed.), p. 873, and to *Taylor on Evidence* (11th ed.), Vol. 1, p. 117.]

There is authority to justify the summing-up of Swift, J., and there was evidence in this case on which the jury must inevitably have come to the conclusion that the appellant was guilty of murder. There was, therefore, material on which the Court of Criminal Appeal were entitled to act under the proviso to section 4 of the Criminal Appeal Act, 1907, and hold that, even if the jury had been directed as contended on behalf of the appellant, the jury must still have found the appellant guilty of murder or at least of manslaughter.

The LORD CHANCELLOR, without calling on Mr. O'Connor to reply, said that the appeal would be allowed and the

conviction quashed. Their Lordships would give their reasons later.

The House took time for consideration.

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May 23.—THE LORD CHANCELLOR (*a*): My Lords, the appellant, Reginald Woolmington, after a trial at the Somerset Assizes at Taunton on January 23, at which, after an absence of one hour and twenty-five minutes, the jury disagreed, was convicted at the Bristol Assizes on February 14 of the wilful murder of his wife on December 10, 1934, and was sentenced to death. He appealed to the Court of Criminal Appeal, substantially upon the ground that the learned Judge had misdirected the jury by telling them that in the circumstances of the case he was presumed in law to be guilty of the murder, unless he could satisfy the jury that his wife's death was due to an accident.

The appeal came before the Court of Criminal Appeal upon March 18 and was dismissed. The Court said "it may be that it might have been better" had the learned Judge who tried the case said to the jury that if they entertained reasonable doubt whether they could accept the appellant's explanation they should either acquit him altogether or convict him of manslaughter only; but, relying upon section 4 (1) of the Criminal Appeal Act, 1907, which provides "that the Court may, notwithstanding they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider no substantial miscarriage of justice has actually occurred", they dismissed the appeal.

Thereupon the Attorney-General gave his fiat certifying that the appeal of Reginald Woolmington involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further

(*a*) This speech is reprinted practically verbatim from a printed judgment supplied by the courtesy of the official shorthand writers to the House of Lords.

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appeal should be brought. The matter now comes before your Lordships' House.

The facts are as follows: Reginald Woolmington is twenty-one and a-half years old. His wife, who was killed, was seventeen and a-half years old last December. They had known each other for some time and upon August 25 they were married. Upon October 14 she gave birth to a child. Shortly after that there appears to have been some quarrelling between them and she left him upon November 22 and went to live with her mother. Woolmington apparently was anxious to get her to come back, but she did not come. The prosecution proved that at about 9.15 in the morning of December 10 Mrs. Daisy Brine was hanging out her washing at the back of her house at 25 Newtown, Milborne Port. While she was engaged in that occupation, she heard voices from the next door house, No. 24. She knew that in that house her niece, Reginald Woolmington's wife, was living. She heard and could recognise the voice of Reginald Woolmington saying something to the effect "are you going to come back home?" She could not hear the answer. Then the back door in No. 24 was slammed. She heard a voice in the kitchen, but could not tell what it said. Then she heard the sound of a gun. Upon that she looked out of the front window and saw Reginald Woolmington, whose voice she had heard just before speaking in the kitchen, go out and get upon his bicycle which had been left or was standing against the wall of her house, No. 25. She called out to him, but he gave no reply. He looked at her hard and then he rode away.

According to Reginald Woolmington's own story, having brooded over and deliberated upon the position all through the night of December 9, he went on the morning of the 10th in the usual way to the milking at his employer's farm and, while milking, conceived this idea, that he would take the old gun, which was in the barn, that morning to his wife's mother's house where his wife was living and that he would

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show her that gun and tell her that he was going to commit suicide if she did not come back. He would take the gun up for the purpose of frightening her into coming back to him by causing her to think that he was going to commit suicide. He finished his milking, went back to his father's house, had breakfast and then left, taking with him a hack saw. He returned to the farm, went into the barn, got the gun which had been used for rook shooting, sawed off the barrels of it, then took the only two cartridges which were there and put them into the gun. He took the two pieces of the barrel which he had sawn off and the hack saw, crossed a field about sixty yards wide and dropped them into the brook. Having done that, he returned on his bicycle, with the gun in his overcoat pocket, to his father's house and changed his clothes. Then he got a piece of wire flex which he attached to the gun so that he could suspend it from his shoulder underneath his coat and so went off to the house where his wife was living. He knocked at the door, went into the kitchen and asked her "Are you coming back?" She made no answer. She came into the parlour and, on his asking her whether she would come back, she replied she was going into service. He then, so he says, threatened he would shoot himself and went on to show her the gun and brought it across his waist, when it somehow went off and his wife fell down and he went out of the house. He told the jury that it was an accident, that it was a pure accident; that, whilst he was getting the gun from under his shoulder and was drawing it across his breast, it accidentally went off and that he was doing nothing unlawful, nothing wrong, and this was a pure accident. There was considerable controversy as to whether a letter in which he set out his grievances was written before or after the above events. But when he was arrested at 7.30 on the evening of the 10th and charged with having committed murder he said: "I want to say nothing except I done it. They can do what they like with me, it was jealousy I

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suppose. Her mother enticed her away from me. I done all I could to get her back. That's all."

The learned Judge in summing up the case to the jury said: "If you accept his evidence, you will have little doubt that she died in consequence of a gunshot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: 'The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. In every charge of murder, the fact of the killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law will presume that the attack would be founded in malice unless the contrary be shown.' That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified."

At the end of his summing-up he added: "The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime, so that

it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident."

In the argument before the Court of Criminal Appeal, cases were cited by the learned counsel on either side and text-books of authority were referred to, but the learned Judges contented themselves with saying "There can be no question, to start with, that the learned Judge laid down the law applicable to a case of murder in the way in which it is to be found in the old authorities." They repeated the learned Judge's words, and said: "No doubt there is ample authority for that statement of the law." They then relied, as I have already mentioned, upon the proviso to section 4 of the Criminal Appeal Act, 1907, and dismissed the appeal.

It is true, as stated by the Court of Criminal Appeal, that there is apparent authority for the law as laid down by the learned Judge. But your Lordships' House has had the advantage of a prolonged and exhaustive inquiry dealing with the matter in debate from the earliest times, an advantage which was not shared by either of the Courts below. Indeed, your Lordships were referred to legal propositions dating as far back as the reign of King Canute (994—1035). But I do not think it is necessary for the purpose of this opinion to go as far back as that. Rather would I invite your Lordships to begin by considering the proposition of law which is contained in *Foster's Crown Law*, written in 1762, and which appears to be the foundation for the law as laid down by the learned Judge in this case. It must be remembered that Sir Michael Foster, although a distinguished Judge, is for this purpose to be regarded as a text-book writer, for he did not lay down the doctrine in any case before him, but in an article which is described as "The Introduction to the Discourse of Homicide". In the folio edition, published at Oxford at the Clarendon Press in 1762, at p. 255, he states: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or

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infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth upon just the same foot that every defendant doth: the matters tending to justify, excuse or alleviate must appear in evidence before he can avail himself of them."

Now the first part of this passage appears in nearly every text-book or abridgment which has been since written. To come down to modern times, the passage appears in *Stephen's Digest of the Criminal Law* (7th ed.), at p. 235; also in the well-known treatise of Archbold, *Criminal Pleading, Evidence and Practice*, which is the companion of lawyers who practise in the criminal Courts. See 29th edition, 1934, at p. 873. It also appears almost textually in *Russell on Crimes* (8th ed., 1923), Vol. 1, p. 615, and in the second edition of *Halsbury's Laws of England*, Vol. 9, which purports to state the law as on May 1, 1933, where it is said at p. 426: "When it has been proved that one person's death has been caused by another, there is a *prima facie* presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder." The authority for that proposition is given as *Foster*, p. 255, and also the case of GREENACRE (1837), 8 Car. & P. 35. The question arises, is that statement correct law? Is it correct to say, and does Sir Michael Foster mean to lay down, that there may arise in the course of a criminal trial a situation at which it is incumbent upon the accused to prove his innocence? To begin with, if that is what Sir Michael Foster meant, there is no previous authority for his proposition, and I am confirmed in this opinion by the fact that in all the text-books

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no earlier authority is cited for it. Before, however, one considers the earlier criminal law several facts have to be remembered.

First, it was not till 1907 that the Court of Criminal Appeal was set up. It is perfectly true that from time to time there have been famous occasions on which the Judges and Barons were called together to give their opinion upon the law bearing on murder. Examples of this will be found: in the year 1611, in the case of MACKALLEY (9 Co. Rep. 65b) all the Judges and Barons were moved to give their opinion; in 1706, in the case of MAWGRIDGE (17 St. Tr. 57), which case was argued before all the Judges, and all of them except Lord Chief Justice Trevor were of opinion that Mawgridge was guilty of murder; and in 1843 in the case of MCNAUGHTON, 4 St. Tr. (N.S.) 847, where all the Judges gave answers to your Lordships' House upon the test of insanity.

MCNAUGHTON'S CASE stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In MCNAUGHTON'S CASE the onus is definitely and exceptionally placed upon the accused to establish such a defence. See OLIVER SMITH (1910), 6 Cr. App. R. 19, at p. 21, where it is stated that the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, must be established by the defendant. But it was added that all the Judges had met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit. See also *Archbold* (29th ed.), pp. 18 and 874. It is not necessary to refer to MCNAUGHTON'S CASE again in this judgment, for it has nothing to do with it.

It is true that, at a later period, certain cases were

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reserved by the Judges for the consideration of the Court of Crown Cases Reserved, but many of the propositions with regard to criminal law are contained either in the summings-up of the Judges or in text-books of authority, as distinguished from a Court sitting in banc.

The learned author of *Stephen's Digest of the Criminal Law* (7th ed., 1926) has an interesting note on the definition of murder and manslaughter at p. 461. But his remarks are rather directed to the ingredients of the crime than to the proof of it. None the less, the author does not hesitate to tread a path of very robust criticism of the previous authorities. He speaks at p. 462 of the " intricacy, confusion and uncertainty of this branch of the law ". He refers to the definition of Coke (1552—1623) and says : " these passages, overloaded, as Coke's manner is, with a quantity of loose, rambling gossip, form the essence of his account of murder ". He describes Coke's chapter on manslaughter as " bewildering " and adds that Hale (1609—1676) treats manslaughter in a manner so meagre and yet so confused that no notion of it can be obtained except by reading through chapters 38 to 40 and trying to make sense of them, and concludes by saying, p. 466, that " Sir Michael Foster to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence ".

Next it must be remembered that prisoners were not entitled to be represented by counsel, except in cases of felony, where counsel might argue the law on their behalf.

Thirdly, it must not be forgotten that the prisoner himself was not allowed to give evidence before the Act passed in 1898.

Bearing these considerations in mind, I now turn to some of the cases cited to us. I doubt whether in any of the early ones the question of the burden of proof was considered. Rather they were concerned with the ingredients of the crime of murder. One of the first difficulties was to settle the meaning of express and implied

malice. It was not till 1825 that Bayley, J., in BROMAGE *v.* PROSSER, 4 B. & C. 247, gave his famous definition of malice as meaning a wrongful act, done intentionally without just cause or excuse. The older cases were rather concerned to give examples of what might be malice. This was so in MACKALLEY'S CASE (*supra*). The prisoner was there accused of murdering a serjeant of London. The Courts were already considering cases of express or implied malice and the passage in Coke appears simply to mean that if a man does acts calculated to kill and actually does kill that is evidence of malice or intent, in other words, evidence of one of the ingredients of murder, but it does not seem to be at all concerned with onus of proof or to support the statement of Sir Michael Foster on that point.

One of the most famous of the earlier treatises on criminal law was the *History of the Pleas of the Crown*, by Sir Matthew Hale. That celebrated Judge died on Christmas Day, 1675. It was known that he had left a treatise on the subject, and upon November 29, 1680, it was ordered by the House of Commons that the executors of Sir Matthew Hale be desired to print the manuscript relating to Crown Law and a committee be appointed to take care of the printing thereof. It is not said that anything appears in Hale suggesting that the burden of proving his innocence lay on the prisoner. Looking at the edition of 1800, chapter 37, Vol. 1, p. 454, is again concerned with what malice is. It is headed "Concerning murder by malice implied presumptive, or malice in law," and MACKALLEY'S CASE (*supra*) is duly cited.

As appears from *Foster's Crown Law*, Sir Michael Foster was familiar with Hale's treatise (see his preface), and, although in the course of his book he makes reference to Hale, he gives no authority for the proposition which is under discussion. It cannot be doubted that at that time in English Courts of Justice the law of evidence was in a very fluid condition. Indeed in some civil cases it differed

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on different circuits. See WEEKS *v.* SPARKE (1813), 1 M. & S. 679, and also note 20, p. 182 in *Stephen's Digest of the Law of Evidence* (10th ed.), 1922. It was only later that the Courts began to discuss such things as presumption and onus. In *Wigmore on Evidence*, Vol. 4, section 2518 note, page 3562, a reference is made to the judgment of Weaver, J., in the case of the STATE *v.* BRADY (1902), Ia. 91 N. W. 801. This was cited in the case of STODDART (1909), 2 C. A. R. 217, at p. 233: "The use of the terms 'presumption of guilt' and 'prima facie evidence of guilt' with reference to the possession of stolen goods has perhaps been too long indulged in by Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. . . . 'Presumptions' of guilt and 'prima facie' cases of guilt in the trial of a party charged with crime, mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offence with which he is charged."

We were referred to the case of LEGG (Sir J. Kelyng's Reports, p. 27) where it is said that "at the [Newgate Sessions in 1674], one John Legg being indicted for the murder of Mr. Robert Wise, it was upon the evidence agreed, that if one man kill another, and no sudden quarrel appeareth, this is murder." MACKALLEY'S CASE (*supra*) is quoted as an authority and the report goes on, "and it lieth upon the party indicted to prove the sudden quarrel." With regard to Kelyng's Reports, the critics have greatly differed. Sir John Kelyng was Chief Justice of the King's Bench. He died in 1671 and, whatever opinion may be held about him as a Judge, upon which see Foss, *The Judges of England*, 1870, p. 381, the critics have differed greatly upon the value of his reports. Lord Campbell in his Life of Kelyng, *Lives of the Chief Justices*, 1849, Vol. 1, p. 511, says "He compiled a folio volume of decisions in criminal cases which are of no value whatever." But, on the other hand there are

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others who regard the book as of high authority, see *The Reporters*, by Wallace, Boston, 1882, p. 327.

The report of LEGG'S CASE (*supra*) is meagre and unsatisfactory and cannot, I think, be held to mean that, unless the prisoner prove the sudden quarrel, he must be convicted of murder. The word "onus" is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving or sometimes the conclusion of the whole matter.

MAWGRIDGE'S CASE, already referred to, was cited to us from Kelyng's Reports, but it was not reported by Kelyng for the simple reason that it was not tried till 1706. Campbell (*supra*), Vol. 2, p. 176, says it was reported by Holt and makes caustic comments on Holt's English composition. It was added by Holt to his edition of Kelyng's Reports and is described as a case of "great expectation" and gives the history of murder trials in English Courts from the earliest times. The case, however, is no authority for saying that the prisoner at any time is called upon to prove his innocence; quite the contrary. It is another of those cases which deal with malice and with what is such provocation as will make the act of killing to be manslaughter only.

In *Hawkins' Pleas of the Crown* (8th ed.), 1824, Vol. 1, p. 88, section 25, it is stated, "It is also agreed, that no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or *se defendendo*, but that he must plead 'not guilty', and give the special matter in evidence." This points to the fact that the verdict must be given not on any special plea given by the prisoner, but upon and as the result of the whole of the case, and it nowhere suggests that the burden of proof either at the beginning or at the end of a case is not on the prosecution.

The case of GREENACRE (*supra*), was certainly heard by a very distinguished Judge, Chief Justice Tindal. But it is to be observed that the dictum relied upon by the prose-

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cution in this case (1837), 8 Car. & P., at p. 42, namely, "that where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder," was contained in the summing-up of the learned Judge to the jury. It is the passage in Sir Michael Foster and this summing-up which are usually relied on as the authority for the proposition that at some particular time of a criminal case the burden of proof lies on the prisoner to prove his innocence. The presumption of innocence in a criminal case is strong, see *Taylor on Evidence* (11th ed.), 1920, Vol. 1, paras. 113 and 114, and it is doubtful whether either of these passages mean any such thing. Rather do I think they simply refer to stages in the trial of a case. All that is meant is that if it is proved that the conscious act of the prisoner killed a man and nothing else appears in the case, there is evidence upon which the jury may, not must, find him guilty of murder. It is difficult to conceive so bare and meagre a case, but that does not mean that the onus is not still on the prosecution.

If at any period of a trial it was permissible for the Judge to rule that the prosecution had established its case and that the onus was shifted on to the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the Judge in such a case to say that the jury must in law find the prisoner guilty and so make the Judge decide the case and not the jury, which is not the common law. It would be an entirely different case from those exceptional instances of special verdicts, where a Judge asks the jury to find certain facts and directs them that on such facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that

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at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution, so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

This is the real result of the perplexing case of SCHAMA AND ABRAMOVITCH (1914), 11 Cr. App. R. 45, which lays down the same proposition, although perhaps in somewhat involved language. Juries are always told that if conviction there is to be the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in DAVIES (1913), 8 Cr. App. R. 211, the headnote of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder

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case the Crown must prove (*a*) death as the result of a voluntary act of the accused and (*b*) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury), the accused is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. It is not the law of England to say, as was said in the summing-up in the present case, "if the Crown satisfy you that this woman died at the prisoner's hands, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime, so that it is only manslaughter, or which excuse the homicide altogether by showing it was a pure accident". If the proposition laid down by Sir Michael Foster or in the summing-up in GREENACRE (*supra*) means this, those authorities are wrong.

We were then asked to follow the Court of Criminal Appeal and to apply the proviso to section 4 of the Criminal Appeal Act, 1907, which says: "the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider no substantial miscarriage of justice has actually occurred". There is no doubt that there is ample jurisdiction to apply that proviso in a case of murder. The Act makes no distinction between a capital case and any other case, but we think it impossible to apply it in the present case. We cannot say that if the

jury had been properly directed they would have inevitably come to the same conclusion.

In the result we decline to apply the proviso and, as already stated, we order that the appeal should be allowed and the conviction quashed.

The other noble and learned Lords concurred.

Conviction quashed.

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Solicitors: C. Butcher & Simon Burns, agents for Clarke, Willmott & Clarke, Taunton, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE LAWRENCE.

LILIAN GRACE PALMER.

1935.
4 *June.*

Evidence—Character of Prisoner—Statement made prior to Trial in Presence and Hearing of Jury—Warning in Summing-up to ignore Statement—Conviction quashed.

Before the trial of the appellant, in the presence and hearing of the jury who were to try her, counsel appearing for her son, who had been put up for sentence on another charge, stated by way of mitigation that his client was the son of a notorious shoplifter. In the summing-up at the appellant's trial the jury were warned to disregard that statement.

Held, in view of the above disclosure with regard to the appellant's character, the proper course would have been to adjourn the case of the appellant and try it before another jury, and in the circumstances the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Buckinghamshire Sessions on April 8, 1935, of receiving stolen property

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and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

Before the trial of the appellant commenced, a son of the appellant, Reginald Palmer, and a man named Andrews were put up for sentence for offences of housebreaking to which they had pleaded guilty. The jury who were to try the appellant were then in the box, but had not been sworn. Counsel for Reginald Palmer put a number of questions to a police inspector who had been called to give evidence with regard to the history of the two men, and then proceeded to address the Court by way of mitigation. In the course of his address he stated that Reginald Palmer was the son of a "notorious shoplifter". He was then stopped, and sentence on Andrews and Reginald Palmer was postponed until after the trial of the appellant. At the end of the summing-up, on the request of counsel for the prosecution, the Chairman specifically warned the jury to dismiss the above statement from their minds.

D. C. L. Potter, for the appellant:

The statement that the appellant was a "notorious shoplifter" in the presence and hearing of the jury who were to try her was a most serious irregularity and one calculated to cause the greatest prejudice. [He referred to HEMMINGWAY (1912), 8 Cr. App. R. 47.] Further, the summing-up was inadequate. There was no direction to the effect that, in order to substantiate the charge, it must be proved that the appellant knew the property to be stolen at the time when she received it, or to the effect that, if she told a story which was consistent with innocence and which might reasonably be true, she was entitled to an acquittal.

T. R. Fitzwalter Butler, for the Crown:

It is conceded that the disclosure of the appellant's bad character was an unfortunate irregularity, but it is submitted that, having regard to the evidence in this

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case, which was very clear, the Court might apply the proviso to section 4 of the Criminal Appeal Act, 1907. The case has some analogy to WRIGHT (1934), 25 Cr. App. R. 35, where the Court adopted that course, although an observation which would lead the jury to suppose that the appellant had been previously convicted had been made in the course of the trial. Here the incident complained of occurred prior to the trial, and the jury may not have paid the same attention to it as if it had occurred during the trial. The summing-up did not contain a full statement as to the ingredients of the offence of receiving stolen property, but emphasised the fact that the burden of proving guilty knowledge was on the prosecution.

THE LORD CHIEF JUSTICE: This appellant was convicted at the Buckinghamshire Sessions of receiving stolen property and was sentenced to twelve months' imprisonment with hard labour. She now, by leave of the Court, appeals against conviction.

Unfortunately, in a case which was heard at the same Court before the case in which the appellant was the accused, it was stated by counsel who appeared for the appellant's son, by way of mitigation, that that son was the son of a mother who was a notorious shoplifter. That remark having been made, attention was directed to it and all that was done was to postpone sentence until after the trial of this appellant. The appellant was, therefore, tried by a jury which had quite recently heard that she was a notorious shoplifter, the jury having been actually in the box, though not sworn, at the time when the remark was made. It is quite true that at the close of the summing-up the Chairman, having had his attention very properly directed to the matter by Mr. Butler, used these words: "Before the case came on, there was a remark about the female defendant, which is not evidence, and you must entirely dismiss it from your minds." That was a request

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to the jury to perform a very difficult feat. It clearly would have been more satisfactory if the case had been adjourned and tried before a jury who had not heard any such remark. That highly unfortunate incident is in itself a sufficient reason for allowing the appeal and quashing the conviction.

There is, however, a further matter. When the Chairman was summing-up on the important and difficult topic of receiving property with guilty knowledge, the words which he used were: "It is for you to say whether you are satisfied beyond any reasonable doubt that they [the appellant and a co-defendant who was tried with her] had a guilty knowledge, that they had every reason to believe and to know that those things were stolen property. . . . The whole essence of the accusation is the point whether the prisoners knew that the property was stolen property." The whole essence of the controversy, however, was whether at the time when they received the stolen property they knew that it was stolen property. The summing-up amounts to a statement to the jury that a person can be found guilty of receiving property well knowing it to have been stolen if, having innocently received the property, he afterwards finds that it was stolen.

It is quite clear that this conviction cannot stand. The appeal must be allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MACKINNON AND MR. JUSTICE FINLAY.

ERNEST SILVERMAN.

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15 *July*.

Habitual Criminal—Sentence of Preventive Detention Quashed.

Sentence of preventive detention on habitual criminal quashed.

Criticism of the practice of charging a prisoner after his release with offences committed prior to the commencement of his term of imprisonment.

Appeal against conviction as a habitual criminal.

The appellant pleaded guilty at London Sessions on May 14, 1935, to various charges of larceny and obtaining goods and money by false pretences, and was found guilty of being a habitual criminal. He was sentenced by the Deputy-Chairman to three years' penal servitude and five years' preventive detention.

E. G. Hemmerde, K.C. (*Bernard Gillis* with him), for the appellant:

The evidence did not justify the finding that the appellant was a habitual criminal. After his release from prison on July 27, 1934, the appellant obtained work as a solicitor's managing clerk and lived a perfectly honest life up till December 31. Further, he had lived honestly from 1915 to 1920, and during the next fifteen years he had worked honestly for periods amounting in all to four years. The Court is asked to consider whether, in all the circumstances of the case, the sentence of penal servitude might not be reduced. [He was stopped.]

J. C. Maude, for the Crown, after the Court had intimated that they did not require argument in support

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of the sentence of penal servitude or of the finding that the appellant was a habitual criminal, did not seek to support the sentence of preventive detention.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty at the London Sessions to a charge of obtaining a cheque by false pretences, to two charges of larceny, to two charges of obtaining goods by false pretences, and to two charges of obtaining money by false pretences. He was also found to be a habitual criminal. He was sentenced to three years' penal servitude and five years' preventive detention, and now appeals against the finding that he was a habitual criminal.

The appellant has undoubtedly had a very unfortunate career. He is now thirty-five years of age and was first accused, when he was only fifteen, of stealing money. He was then bound over in his own recognisances to come up for judgment if called upon. Five years later, when he was twenty, he was again charged with stealing money and was then sent to prison for three months. He was afterwards charged with larceny of clothing as a servant at times antecedent to the date of the conviction for stealing money: in other words, after his release from prison, he was charged with an offence committed before his term of imprisonment began. On the later occasion he was sentenced to concurrent terms of one, two and six months' imprisonment. It cannot be said too emphatically that, when a man has been sentenced to a term of imprisonment and it is intended to proceed further against him for offences previously committed and then known, it is the duty of the responsible authorities to make up their minds at once whether any and, if so, what steps are to be taken. It is not fair either to the convicted person or to the public to leave him in prison to serve his term and after his release commence for the first time proceedings against him for an offence committed before the term of imprisonment began. This

instance goes back to the year 1921. It may be hoped that such a practice, which was then by no means uncommon, has become far less common at the present time. It ought to be wholly extinct.

In June, 1922, the appellant was further convicted on six charges of obtaining goods and money by false pretences, and was sentenced to two years' imprisonment, no doubt partly on account of his then existing criminal record. Afterwards, in July, 1924, he was convicted of stealing clothing from his employers, a number of other cases being taken into consideration. He was then sentenced to three years' penal servitude. In January, 1927, he was sentenced at the London Sessions to four years' penal servitude, and a long series of outstanding charges was then taken into consideration. In April, 1932, he was sentenced at the Central Criminal Court to three years' penal servitude for a series of offences of stealing jewellery and obtaining cheques and money by false pretences, sixteen cases being then taken into consideration. From serving that sentence he was released on July 27, 1934. In August he obtained work in a solicitor's office, and it is undisputed that he worked well and honestly up to the end of December. There was then an outburst, and in the space of six weeks he committed seven offences of larceny and obtaining goods and money by false pretences. His salary was at the time 50s. a week and he was not in want of money, his explanation being that he found it impossible to resist the temptation to commit fraud once he had jewellery in his hands.

The appellant is right in calling attention to the period from 1915 to 1920 when he was in honest employment, but that is a long time ago. There have also been later intervals when he kept free from dishonesty. Undoubtedly there were in this case materials on which the jury were entitled to find that the appellant was a habitual criminal and there is no fault to be found with the summing-up, but the law which provides for the conviction of a person as

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a habitual criminal in a proper case does not render it necessary that the Court should after such a conviction pass a sentence of preventive detention. The matter is one left to the discretion of the Judge, having regard to all the circumstances of the case. There is not in this case the least ground for criticising the way in which the Deputy-Chairman exercised his discretion, or for suggesting that the summing-up was erroneous, but, having regard to all the facts of the case, and not least to the unfortunate start of the appellant's career and to the manner in which he was dealt with as a youth—a course which, it is to be hoped, would not be adopted to-day—we think that this sentence of preventive detention may properly be quashed. The sentence of penal servitude and the finding that the appellant was a habitual criminal will stand.

Sentence reduced.

Solicitors for appellant, Conway (Philip), Thomas & Co.; for the Crown, T. Macdonald Baker.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MACKINNON, AND MR. JUSTICE HILBERY.

1935.
26 *July.*

REGINALD ARTHUR WADEY.

Evidence—Character of Prisoner—Indecent Assault—Questions in Cross-examination as to Previous Complaints of Similar Conduct—Dismissal of Charges—Admissibility of Cross-examination.

The appellant was charged with indecent assault on three young girls, and put his character in issue. In cross-exami-

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nation he was asked a number of questions with regard to previous complaints by other young girls of similar conduct on his part. Those complaints had led to charges which in every case had been either dismissed or not proceeded with. Similar questions were put in cross-examination to a witness called by the appellant as to character.

Held, the cross-examination was inadmissible, and the conviction must be quashed.

MAXWELL (1934), 24 Cr. App. R. 152, followed and applied.

Appeal against conviction.

The appellant was convicted at Middlesex Sessions on July 4, 1935, of indecent assault on three young girls, and was sentenced by the Deputy-Chairman to concurrent terms of three months' imprisonment in the second division.

The appellant was a schoolmaster, and the offences charged related to three of his girl pupils. On May 3, 1935, six summonses charging the appellant with offences against other girl pupils had been heard by justices for the Wealdstone division of Middlesex, and in every case the summons had been either dismissed or not proceeded with. On June 18, eight further summonses charging the appellant with similar offences came before the same Bench. On three summonses he was committed for trial, two were dismissed, and the remaining three were not proceeded with. At the trial the appellant put his character in issue, and was asked in cross-examination a number of questions relating to the other charges which had been dismissed or not proceeded with. Similar questions were put in cross-examination to a witness called by the appellant as to character.

J. D. Cassels, K.C. (*A. Capewell* with him), for the appellant:

The principal ground of appeal is that the appellant was wrongly cross-examined as to previous complaints of a similar nature against him, and that one of the witnesses called by him as to character was cross-examined in the same

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manner. These questions in cross-examination were clearly contrary to the law as laid down by the House of Lords in MAXWELL (1934), 24 Cr. App. R. 152. The jury were not warned in the summing-up to ignore these pieces of irrelevant evidence. Further, counsel for the prosecution wrongly observed in his address to the jury that one of the witnesses who had been called as to character was called by the defence at the police court as to fact also, and made other statements which were not borne out by the evidence.

G. Temple Martin, for the Crown:

It is submitted that this case can be distinguished from MAXWELL (*supra*). The questions which are objected to were put by the prosecution on the basis of other complaints with regard to the appellant's character having been made, and as being relevant to the issue of his good character. The fact that the complaints had led to charges being made was introduced by the defence. Moreover, after these questions had been put, the jury, at a later stage in the case, intimated that they were perfectly satisfied as to the appellant's good character, and the questions cannot, therefore, have influenced the minds of the jury in a manner adverse to him.

THE LORD CHIEF JUSTICE: This appellant was convicted at Middlesex Sessions of indecent assault on three young girls and was sentenced to three months' imprisonment in the second division. He now appeals against his conviction.

As the name of the Director of Public Prosecutions has been mentioned in the course of the appeal, it is right to say that this was a private prosecution with which the Director was not concerned. The Director has simply instructed counsel to appear before this Court to help the Court to have all the facts before it. There his responsibility begins and ends.

The grounds of appeal are that counsel for the prosecution wrongly cross-examined the appellant and a witness

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to the appellant's character about other charges which had been made against the appellant and had been dismissed. It is further complained that both in his opening and final speeches counsel for the prosecution referred to matters which were not in evidence. It is quite clear that those complaints are well founded. One irregularity followed another in this case. To say that the trial was unsatisfactory is to understate the truth; it was a deplorable trial. It is unfortunate that the Deputy-Chairman in his summing-up did not cure, if he could have cured, the mischief which had been caused. Counsel entrusted with the public task of prosecuting accused persons should realise that one of their primary duties is to be absolutely fair. It is sufficient to say that this was a most unsatisfactory trial. The appeal must be allowed, the conviction quashed, and the appellant discharged.

Conviction quashed.

Solicitor for appellant: E. G. Floyd.

NOTE.—In this case, owing to an error, the usual practice was not adopted of informing the Deputy-Chairman, before whom the case was tried, that there was an appeal, and of giving him an opportunity of forwarding to the Court any observations on the case.

BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE FINLAY AND MR. JUSTICE HUMPHREYS.

1935.
14 *August.*

JAMES ARTHUR MINIGHAN.

Procedure—Shorthand Note of Trial—Written Police Report to be Incorporated.

When at any trial a written police report of the prisoner's record is handed to the presiding Judge by a police witness, a copy of the report ought to be handed to the shorthand writer for incorporation in the shorthand note of the case.

Application for leave to appeal against sentence.

The applicant pleaded guilty at Cheshire Quarter Sessions on July 3, 1935, to store-breaking after a previous conviction for a similar offence and was sentenced by the Chairman to three years' penal servitude.

Before sentence was passed a police sergeant, who was called as a witness by the prosecution to give evidence of the applicant's past record, read and then handed to the Chairman a written report containing a record of the applicant's history and previous convictions. In consequence of this procedure the shorthand note of the proceedings did not set out the report at length, but merely stated that it had been read and handed to the Chairman.

HUMPHREYS, J., in giving the judgment of the Court refusing the application, said: The shorthand note of the proceedings in this case is incomplete in that the evidence of the police officer does not appear in detail. At the trial the officer, on being asked to give the prisoner's history, read a written report of the prisoner's past record and previous convictions, and handed it up to the Chairman, and the shorthand writer was unable to take down what was con-

tained in it. This is not an isolated case of such an occurrence, and the Court thinks it right to say that in its opinion the proper course in any case where a written police report is handed to the presiding Judge would be to hand a copy to the shorthand writer so that it may be incorporated at length in the shorthand note of the case.

Application refused.

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JAMES ARTHUR MINIGHAN.

Swift, J., Finlay, J., Humphreys, J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE SINGLETON.

ALEC BENNETT SUGARMAN.

1935.
15 *October.*

Evidence—Cross-examination of Prisoner—Receiving Stolen Goods—Money found on Prisoner on Arrest—Suggestion that it represented Proceeds of Sale of other Stolen Property received—Conviction quashed.

The appellant, who was charged with receiving part of the proceeds of several cases of shopbreaking and housebreaking, put his character in issue at the trial, and was asked in cross-examination a series of questions suggesting that he had feloniously received other portions of the stolen property (of which there was no evidence), and that a sum of money found on him on arrest represented the proceeds of the sale by him of those portions of the property.

Held, the cross-examination was inadmissible as offending against the principles laid down by the House of Lords in MAXWELL (24 Cr. App. R. 152), and the conviction must be quashed.

Observations on the duties of prosecuting counsel.

Appeal against conviction and application for leave to appeal against sentence.

The appellant was convicted at the London Sessions on

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July 16, 1935, of receiving part of the proceeds of six cases of shopbreaking and housebreaking, and was sentenced by the Chairman to twelve months' imprisonment with hard labour, and ordered to pay £50 towards the costs of the prosecution.

The following statement of facts is, in substance, taken from the judgment of the Court:

The case for the prosecution was that the premises of the appellant were searched on June 15, 1935, and that in a certain room there were found four (out of five) wireless sets and an accordion stolen on June 4, 113 gowns (out of 300) stolen on June 13, one wireless set (out of five sets) stolen on May 21, one wireless set (out of four sets) stolen on May 29, one wireless set (out of three sets) stolen on June 4, and three (out of five) accordions stolen on May 25. According to the evidence of the police, the appellant then endeavoured to account for the possession of all that property by saying that he had sold his business at Shepherd's Bush Market a fortnight before; he produced certain receipts, none of which was a receipt for dresses, and said that the dresses found on the premises were old stock, which had been in his business for ages, and that he had torn up the receipts for the wireless sets, which he had purchased two months before, except for two, which he had taken in part exchange. At the trial the appellant challenged the account given by the police of that interview, and said that he had found the receipts. Two receipts were then produced by him, the first being a receipt (signed by one Seabrook) for the sum of £50, dated June 6, in respect of seven wireless sets and four accordions, and the second a receipt for £30, dated June 13, in respect of 130 job gowns. He said that all the goods had been bought from a man named Giles, who was introduced to him by Scriven through Seabrook, whom he knew; that he had carried on a gown business for two years, but had sold it early in June, and that he also had stalls at two other markets for wireless, gramophones, cycles

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and general merchandise; that early in June Seabrook had visited him at his house and said that he knew of some wireless sets, which were later produced by Giles, who came with Seabrook and Scriven; that he [the appellant] paid cash and took the receipt from Seabrook, Giles having said that the goods had been obtained by distress for rent; that some days later Giles came again with the gowns and gave a receipt in his own name. The appellant also said that he had had the receipts at the police court and had mentioned them to the solicitor who then appeared for him.

The appellant put his character in issue at the trial, and the following passage occurred in the cross-examination of the appellant: "*Q.* How much did they [the police] take off you when you were arrested? *A.* £75. *Q.* These goods you say you bought from Giles, you bought for the purpose of re-sale, did you not? *A.* That is correct, sir. *Q.* Just turn things over in your mind. Had you already disposed of any of the goods that you bought from Giles? *A.* Never seen him before in my life. *Q.* You know, do you, now that the goods Mr. Giles brought you—I will just draw attention to what I mean. The earlier stealing, Mackay's, on May 21, five wireless sets; there is only one left. *A.* Yes, I noticed that. *Q.* The next one, May 26, five accordions, there are three left? *A.* Yes. *Q.* The next one, Long's; out of four wireless sets, only one left, and then when we come to Collier's, out of the four wireless sets—that is June 4—out of five wireless sets and one accordion you have got them all except one? *A.* Yes. *Q.* And then Paradine's dresses, over 100 out of the 300? *A.* That is correct. *Q.* The £75 that was found on you, had that come from stuff that you had sold in the course of your business? *A.* No, sir; I am always walking about with money on me; I have got £100 in my pocket now. I have always got money on me. As a dealer I need it; I never know when I need that money. *Q.* Where does it come from—the stuff you sell? *A.* From general business,

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yes, sir. *Q.* Had you sold any wireless or gramophone of the Giles' stuff? *A.* No sir, this was the exact amount as my receipts are for, which the police called for and took away."

J. D. Cassels, K.C. (*Henry Harris* with him), for the appellant:

Two grounds of appeal are relied upon. In the first place, it is contended that it was wrong for the Chairman to comment adversely on the failure of the appellant to produce at the police court the receipts which were produced by him at the trial. [He referred to NAYLOR (23 Cr. App. R. 177; [1933] 1 K. B. 685) and LITTLEBOY (24 Cr. App. R. 192; [1934] 2 K. B. 408)]. Secondly, complaint is made of a series of questions put to the appellant in cross-examination. The clear suggestion of those questions was that the appellant had really received all the stolen property, and that the money which he had in his pocket on arrest represented the proceeds of part which he had already sold. There was no foundation for that suggestion, and it is submitted that the questions offended against the principles laid down by the House of Lords in MAXWELL (24 Cr. App. R. 152). It is impossible to say what was their effect on the minds of the jury.

J. F. Eastwood, for the Crown:

It is submitted that the questions complained of do not come within the principle of MAXWELL (*supra*). They were relevant, inasmuch as they were asked to discredit the two receipts which the appellant had produced and also because they went to the general credit of the appellant. Under section 43 of the Larceny Act, 1916, evidence could have been given of property recently stolen other than that named in the indictment having been found in the possession of the appellant, and accordingly it is submitted that these questions, assuming they were relevant, were admissible, even though they may have suggested to the jury that

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he had received other stolen goods. [The Court intimated that they did not require argument on the first point taken on behalf of the appellant].

THE LORD CHIEF JUSTICE: This appellant was convicted at the London Sessions before the learned Chairman of receiving part of the proceeds of six cases of shopbreaking and housebreaking and was sentenced to twelve months' imprisonment with hard labour and ordered to pay £50 towards the costs of the prosecution. He now appeals against conviction and applies for leave to appeal against sentence.

With regard to conviction, two points have been taken. The first is a contention based on certain remarks made by the Chairman on the non-production of certain receipts, and appears to us to have no substance in it. The second contention, which does call for serious consideration, is that certain questions were put to the appellant in cross-examination which ought not to have been put. The matter is expressly raised in the further grounds of appeal, paragraph 8 of which alleges "that the learned counsel for the Crown wrongly cross-examined the appellant by suggesting to him that he had feloniously received other goods and that the sum of £75 found upon him on arrest was the proceeds of the sale of such goods." [His Lordship then stated the facts, and read the passage complained of in the cross-examination of the appellant as set out above, and continued.] The question which has to be considered is not primarily with what purpose in the mind of the cross-examiner were those questions asked, but what was the effect likely to be produced on the minds of the jury. I am left in a little doubt as to the purpose for which the questions were asked. In one breath it was said that they were put for the purpose of testing the two receipts, and in another breath that they were put for the purpose of testing the credibility of the witness by suggesting that he had received

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other stolen property beyond that named in this part of the indictment. That proposition is a remarkable one, and still more remarkable is the argument by which it is sought to be justified. The argument was that if property recently stolen, but not specified in the indictment, had been found in the possession of the appellant, evidence might have been given to prove his possession of that property; and then, by a leap, the inference is that, as other stolen property was not found in his possession, it may nevertheless be suggested to the jury that he had received other stolen property. It does not seem to be material whether the purpose of the questions was to test the merits of the two receipts. Some of the questions are a long way distant from the receipts, but, however that may be, when one considers the second avowed purpose of the questions and their probable effect on the minds of the jury, it seems impossible to escape the conclusion that they might well convey to the jury the suggestion that the appellant had received stolen property other than that which was the subject of the charge and concerning the receipt of which the prosecution had no evidence, and indeed that he was a man who was in the habit of having in his possession property which he knew to be stolen. No impression could have been more injurious to the appellant, and, when one looks at the words used in the judgment of the House of Lords in MAXWELL (24 Cr. App. R. 152), it seems to me that questions of that kind, asked in that context, come clearly within the mischief of the questions which in that case were held to be improper. They were not only likely to lead the minds of the jury astray into a false issue whether the appellant had feloniously received other stolen property, but were well calculated to lead the jury into thinking that it was probable that the appellant had committed the offence with which he was charged as being just the sort of man likely to be guilty of that kind of offence.

It cannot be too often made plain that the business of

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counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done. It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law. By so doing he can only weaken his case and may prevent a verdict which ought otherwise to be obtained. As the Lord Chancellor (Lord Sankey) said in MAXWELL (24 Cr. App. R. 152, at p. 176); "It must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed."

The Court has no alternative in this case, whatever its merits or demerits otherwise may be, but to allow the appeal and quash the conviction.

Conviction quashed.

Solicitors—Bennett, Bennett & Rabin, for appellant; T. Macdonald Baker for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE SINGLETON.

1935.
22 *October.*

JOHN ALFRED CURRELL.

Receiving stolen property—Summing-up—Necessity for careful and proper direction.

Conviction of receiving stolen property quashed on the ground of non-direction on this charge in the summing-up, the Court reiterating the rule laid down in SCHAMA AND ABRAMOVITCH (11 Cr. App. R. 45, at p. 49) that "it is essential in cases of this character that there should be a careful and proper direction."

NEWMAN (9 Cr. App. R. 134) is not now to be relied upon as an authority that there may be cases of receiving where a careful summing-up is not essential.

Appeal against conviction.

The appellant was convicted at Northamptonshire Sessions on July 4, 1935, of receiving a stolen horse, and was ordered by the Chairman to be bound over for two years. On another count in the indictment which charged him with stealing the horse he was acquitted.

Douglas Jenkins, for the appellant:

In my submission this conviction cannot stand; the prosecution conducted their case until almost the last moment of the trial on the basis that this was a case of stealing or nothing. In this, in my view, they were right.

The appellant upon different occasions had made three statements not entirely similar to each other, and at the trial he went into the witness box and told a fourth story which contained some of the salient features of his previous statements, but it was clear that he adhered to his allegation that he had bought the horse from two gypsies in an innocent manner.

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The Chairman read the two counts of the indictment to the jury and in so doing accidentally omitted to point out that it was essential that it should be proved before them that the prisoner knew the horse was stolen at the time he received it.

[THE LORD CHIEF JUSTICE: In his summing-up the Chairman used the word "take" in an ambiguous manner on two occasions?—That is so.]

Further, having regard to the course which the trial had taken, the Chairman refrained entirely from directing the jury on the law applicable to a charge of receiving stolen property. (He was stopped.)

R. C. Vaughan, for the Crown:

It is true that the summing-up did not deal with ingredients of the charge of receiving, but in my final speech I had dealt fully with this matter, and the issues were clearly raised before the jury by the cross-examination. There is authority for the proposition that in a very clear case no summing-up at all may be required: NEWMAN (1913) 9 Cr. App. R. 134. [He referred also to FINCH (1916) 12 Cr. App. R. 77.]

THE LORD CHIEF JUSTICE: This appellant was convicted at the Northamptonshire Quarter Sessions of receiving a stolen horse with knowledge that it was stolen. He was bound over for two years and now appeals against conviction. The grounds stated in the notice of appeal are that he was indicted for stealing a horse, that the case was presented as a case of stealing and that there was no direction at all upon the question of receiving, and that there was no evidence of guilty knowledge.

The summing-up of the Chairman is in one sense a model in that it is brief, but there are two observations to be made about it. In one passage the Chairman said: "The question for you to apply to is: Who took it? Whoever it was —if it was Currell—you have to be satisfied in your own

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minds that, if he did take it, he took it with intent," and in a later passage he said: "If on the other hand you think that this story of Currell's has been just a concocted story, so to speak, and put up by way of defence, and that he knew all along whose horse it was—that he did take it, and he must have known whose horse it was—then undoubtedly it would be your duty to find Currell guilty." It is quite obvious when one reads those passages that the word "take" is being used ambiguously; in one case it means actually "take in the field," but in the other case it appears to mean "receive with guilty knowledge." There was no direction at all as to the ingredients of the offence of receiving property well knowing it to have been stolen, and the Chairman, in a communication to this Court, says: "I did not direct the jury's attention to the charge of receiving beyond reading the indictment to them." Is that sufficient? Our attention has been directed to a curious case, NEWMAN (1913) 9 Cr. App. R. 134. I cannot help thinking, as I desire to think, that for some reason the report of that case is insufficient. It does seem a somewhat remarkable thing that this Court should hold that in a case of receiving no summing-up at all might suffice. That case was heard in August, 1913, and in November, 1914, the case of SCHAMA AND ABRAMOVITCH (1914) 11 Cr. App. R. 45, of which this Court so often hears, was before this Court. That case really decides no more than this, that the burden of proof is on the prosecution, but the Lord Chief Justice (Lord Reading), in giving the judgment of the Court, said at p. 48: "Cases of this kind have come frequently before this Court complaining of language used by the Judge at the trial in pointing out the principle of law for the guidance of the jury." "Cases of this kind" mean cases in which a person is charged with receiving property with guilty knowledge. Then follow these notable words: "It is essential in cases of this character that there should be a careful and proper direction."

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In the opinion of this Court, that is a correct statement of the law, and in view of that statement in 1914, it would be better to regard the case of NEWMAN (*supra*) as a misprint. We affirm the proposition that in a case of this character there should be a careful and proper direction. In the present case *ex concessis* there was no direction at all on the charge of receiving, and that is the offence of which the jury convicted. On the charge on which there was a direction the jury acquitted. This summing-up does not avail. The appeal must be allowed, and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE SINGLETON.

1935.
28 *October*.

LIONEL SMITH (*senior*)
LIONEL SMITH (*junior*)

Receiving Stolen Goods—Summing-up—No Distinction drawn between Cases of two Prisoners—Constructive Possession—Guilty Knowledge—Silence of Prisoners at Police Court.

The appellants, who were father and son, were each convicted of receiving stolen property. There was no evidence that the father had ever been in physical possession of the property, or that he had ever seen it before the police found it in a shed occupied by him in which the son was at the time sleeping. On being questioned by the police, the father said : " My boy will tell you all about it," but there was a conflict of testimony as to what the son had said. According to his own evidence, he had given the police a detailed account of the circumstances in which the property was brought to the shed. The appellants were represented at the police court, and neither made any statement or gave evidence. Both appellants appealed on the ground that the

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summing-up contained mis-direction and non-direction in law.

Held, the summing-up was unsatisfactory in that (*a*) it drew no distinction between the cases of the two appellants, though such was essential in a case of this kind; (*b*) the jury were not told that they could convict the father only if they were satisfied either that he knew of the theft beforehand and that some kind of pre-arrangement between him and the thief, or thieves, existed, or that he subsequently adopted the receiving of the goods by his son, and at the time of such adoption had guilty knowledge; (*c*) adverse comments on the silence of the appellants when before the magistrate had been improperly made, and both convictions must be quashed.

The appellants, who were father and son, were convicted at the London Sessions, before the Acting Deputy-Chairman, on September 12, 1935, of receiving stolen property. Smith, senior, was sentenced to twelve months' imprisonment with hard labour; Smith, junior, was ordered to be bound over for two years.

On Saturday, August 17, a large number of boots and shoes were stolen from a shop in Hackney Road. On the early morning of Monday, August 19, twelve sacks containing the greater part of the stolen property were found by the police in a shed occupied by Smith, senior, in which Smith, junior, was at the time sleeping. The defence of Smith, senior, at the trial was that he had never been in possession of the property, and there was no evidence that he had ever been in physical possession of it or had ever seen it before the arrival of the police. When questioned by the police he had said: "My boy will tell you all about it." According to the evidence of the police, Smith, junior, had merely said that two men had brought the sacks on Sunday morning about eight o'clock and asked him to look after them; but, according to the evidence of Smith, junior, himself, he had given a far more detailed account of the circumstances in which the goods were brought to the shed, including the fact that he had let part of the premises to two men for storage and had received 4s. in payment.

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At the police court both prisoners were represented, and neither made any statement or gave evidence.

The following passage occurred in the summing-up: "When they were cautioned and charged did they ever say anything about letting part of these premises for four shillings? Not a word. One would think when the police asked them: 'Well, here are these goods; give us some explanation,' he would say at once: 'Well, I let part of these premises to these people so that they could store these goods.' Not a word about it. Then again, when they were before the magistrate, when they were asked if they had anything to say, they had an absolute defence if it is true: 'I never received these things, they have never been in my possession except as a bailee. I let the premises to those people to store the things for four shillings.'

Mr. Marston Garsia, counsel for both prisoners: 'My Lord, I think I ought to tell your Lordship that they were represented at the police court.'

The Deputy-Chairman: 'I cannot help that; it may be, but I cannot help that. I am telling the jury a fact. Not a word was said.'"

T. R. Fitzwalter Butler, for both appellants:

The summing-up was unsatisfactory in various respects. In the first place, the defence of Smith, senior, was that he had never been in possession of the property, and there was no evidence that he had ever been in physical possession. He could be convicted, therefore, only if he came into constructive possession with guilty knowledge, and a very careful direction was necessary on this part of the case. The Acting Deputy-Chairman, however, assumed that the relation of master and servant existed between father and son, which was a matter in issue, and then told the jury in effect that the father might come into possession of the property by ratifying the son's possession, but he never made it clear that, in order to render himself liable, the father must have had guilty knowledge at the time of such ratification. Further, there were improper comments in the summing-up on non-disclosure of defence prior to trial. The propriety of

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comments of this kind was recently considered in LITTLEBOY (24 Cr. App. R. 192; [1934] 2 K. B. 408), which laid down that, though there is no general rule that comments on non-disclosure of defence prior to trial should never be made, such comments, if made, must be made "with care and with fairness to the accused person in all the circumstances of the case." Here, there was a direct conflict of testimony whether the whole defence of Smith, junior, had in substance been disclosed to the police when they began to make inquiries, but the Acting Deputy-Chairman treated the evidence of the police as conclusive on this matter, and then proceeded to comment on nothing having been said by either defendant at the police court.

[HUMPHREYS, J.: If comments of this kind on a prisoner's silence at the police court are to be made in such circumstances, would not the statutory caution which is administered be misleading?

THE LORD CHIEF JUSTICE: Would not it actually amount to a trap?

That must be so. [He was stopped.]]

E. J. P. Cussen, for the Crown:

The summing-up cannot be considered satisfactory, and it must be conceded that no clear distinction was there drawn between the cases of the two prisoners, but that distinction had become very apparent in the course of the trial. At the end of the summing-up the jury were told that, if they thought the story told by either prisoner might be true, they should acquit.

MR. JUSTICE SINGLETON: These two appellants, who are father and son, each bearing the name of Lionel Smith, were convicted at the London Sessions before the Acting Deputy-Chairman on a charge of receiving stolen boots and shoes well knowing that they were stolen. The father was sentenced to twelve months' imprisonment and the son was bound over for two years. Each appeals, by leave of this Court, against conviction.

The grounds of appeal are that the defence was not

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put to the jury, and that there was mis-direction on the law and no proper direction on the subject of guilty knowledge. There was also a further complaint urged before us by counsel for the appellants, namely, that the Acting Deputy-Chairman assumed that the relation of master and servant existed between father and son instead of leaving that matter to the jury. Furthermore, it was complained that in the summing-up a reference was made to the fact that neither father nor son had made any statement or given any evidence at the police court, and that that reference suggested that the jury were entitled to draw some inference against them from that fact.

The evidence was that there had been a breaking and entering and a stealing of the goods on the night of August 17, or thereabouts, and that on the morning of the 19th twelve sacks of stolen boots and shoes were found by the police in a shed occupied by the father in which the son was sleeping; that the son told the police that two men had brought the goods to the shed the day before; and that the father, when seen by the police, said: "My boy will tell you all about it." When giving evidence at the trial, the father said that he had never seen the goods until the officer came and pointed them out to him, and indeed it was clear that there was no evidence at all that the father physically received the goods, and if he was to be convicted it could only be on the basis that the son had received the goods, that he had communicated the fact to his father, and that the father at that time knew that the goods were stolen, and adopted the transaction with that knowledge.

It is obvious that in such a case, as indeed in every case where the charge is one of receiving stolen goods, a careful direction is necessary. It was necessary that a distinction should be drawn between the cases of the two appellants, but no such distinction was drawn in this summing-up.

[His Lordship referred to several passages in the summing-up, and continued:]

Nowhere does the Acting Deputy-Chairman direct the

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attention of the jury to the necessity of proof that Smith, senior, received the goods. The most that could be said was that the son had allowed them to be put into the shed; there was no proof that the father had ever seen them. Nowhere is a distinction drawn between the case against the father and the case against the son. Even if there was evidence on which the jury could find that Smith, senior, received the goods, he could not be convicted on a charge of receiving them knowing them to have been stolen, unless there was evidence that he knew of the theft beforehand and that there had been a pre-arrangement of some kind or that, at the time when he adopted the transaction and received the goods himself through his agent, he knew that those goods were stolen. That part of the case against Smith, senior, was not dealt with at all.

Further, in one passage of the summing-up, the Acting Deputy-Chairman said: "Then again, when they were before the magistrate, when they were asked if they had anything to say, they had an absolute defence if it is true: 'I never received these things, they have never been in my possession except as a bailee. I let the premises to those people to store the things for four shillings.' . . . Not a word was said." That follows a passage in which he had pointed out that not a word had been said by Smith, junior, when he was seen by the police officer. According to the evidence given by Smith, junior, at the trial, a great many words had been said, and he had told the officer what had happened. Having commented inaccurately on that part of the case, the Acting Deputy-Chairman proceeded to tell the jury that both prisoners had said nothing when they were before the magistrate. They were entitled to say nothing. Each had given his answer to the police, and each was represented at the police court. The fact that they said nothing at that stage ought not to have been used against them in the summing-up. We think that there was a misdirection in that respect also.

On all these grounds we feel that there is no course open

to this Court except to allow the appeals and quash the convictions of both appellants.

Convictions quashed.

Solicitors—Lewes Philipps, for appellants; T. Macdonald Baker, for the Crown.

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BEFORE

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WILLIAM CHARLES RICHARD PECKHAM.

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Evidence—Trial on one of two Indictments—Admission of Evidence relevant only to other Indictment—Duty of Prosecuting Counsel to acquaint themselves with Indictment before opening—Character of Prisoner—Prejudicial Statement inadvertently made by Witness—Application for a Fresh Trial—Duty of Court to begin Trial afresh before new Jury.

It is the duty of counsel for the prosecution before opening to acquaint themselves with the contents of the indictment.

Where a statement prejudicial to a prisoner with regard to his previous record has been inadvertently made to the jury by a witness, and counsel for the prisoner applies for the trial to be started afresh, the Court ought to begin the trial again before a new jury.

A prisoner, who was charged upon two indictments, was given in charge to the jury upon one indictment, but, owing to a misunderstanding, evidence was admitted which was relevant only to the other indictment. In the course of the trial a witness for the prosecution stated in answer to a question put to him in cross-examination that he had been in the prisoner's house while the latter was away in prison. Counsel for the prisoner objected and applied for the trial to be started afresh, but his application was refused and the prisoner was convicted.

Held, the conviction must be quashed.

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Appeal against conviction.

The appellant was convicted on October 2, 1935, at Dorset Quarter Sessions of stealing a number of domestic fowls, and was sentenced by the Deputy-Chairman to eighteen months' imprisonment with hard labour.

The prisoner was arraigned on two indictments, in one of which he was charged alone with stealing, and alternatively with receiving, a number of domestic fowls on a certain date, and in the other, containing four counts, he was charged together with Florence Rose Nethercott with stealing, and alternatively with receiving, other fowls on other dates. He pleaded not guilty to both indictments and was then tried upon the second indictment; but, owing to a general misunderstanding, evidence was admitted which was relevant only to the first indictment.

In the course of the trial a witness for the prosecution, in reply to a question put to him in cross-examination whether he had been into the prisoner's house, said that he had been in the house while the prisoner was away in prison. Counsel for the prisoner objected, and applied for the trial to be begun again before a fresh jury, but his application was refused. No further reference was made to this statement at any stage of the trial, and the prisoner was convicted.

F. E. Hodgson, for the appellant:

There was misreception of evidence in that evidence was admitted which was relevant only to the first indictment. Further, the fact that the prisoner had been previously convicted was disclosed to the jury by a witness for the prosecution, and no warning was given to the jury that they must disregard such evidence. Objection was actually taken at the trial, but it was overruled.

W. Maitland Walker, for the Crown:

There may have been irregularities in this trial, but the conviction should not on that account be quashed. The

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trial may have been rendered a nullity, and in that case there should be a re-trial. The statement that the prisoner had been in prison did not necessarily mean that he had been convicted; he might have been there for non-payment of rates, etc. The fact that no reference was made to such statement is not necessarily a ground for quashing the conviction. It may be the best course for the presiding Judge to make no reference to such a statement. [He referred to WRIGHT (1934), 25 Cr. App. R. 35.]

THE LORD CHIEF JUSTICE: It is clear from the transcript, as well as from what has been said in this Court, that this trial proceeded, for a considerable time, at any rate, when neither the Deputy-Chairman, nor the Clerk of the Peace, nor any of the three counsel who appeared from time to time on behalf of the Crown, nor counsel for the defence, knew with what the appellant was really charged. The appellant was first called upon to plead to both indictments, but he was given in charge to the jury on one indictment only. Nevertheless, the case was opened on behalf of the Crown on all the materials of both indictments, and, as the trial on one indictment proceeded, evidence was given which was relevant only to the other indictment. Counsel for the Crown had not looked at the indictments. After the trial had gone a certain length on the footing that all the witnesses who could give evidence on one indictment only were available to give evidence on the other indictment, there was an adjournment, and then, the attention of the Court being directed to the real state of affairs, the Deputy-Chairman told the jury to "wash out of their minds" the evidence which had been given before the adjournment.

Another matter which is complained of is that a certain witness for the prosecution, in reply to a question put to him in cross-examination whether he had been to the prisoner's house, said that he had been in that house when

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the prisoner was away in prison. The appellant's counsel raised an objection and asked that the trial should be begun again with a new jury, but his objection was overruled. Moreover, no warning was afterwards given to the jury that they were not to pay any attention to this inadvertent statement on the part of the witness. It may be that in particular cases and on particular facts it is not necessary for a reference to be made in the summing-up to a prejudicial statement of this kind inadvertently made by a witness. Every case must be looked at in relation to its own facts. But there is a great difference between those cases and the present case in that here there was an application by counsel for the prisoner that the trial should be started afresh. It was in those circumstances that the Deputy-Chairman refrained even from alluding to the topic when he came to sum up. In the opinion of this Court, where a statement with regard to a prisoner's previous record is inadvertently made from the witness-box to his prejudice, and his counsel applies for the trial to be begun again before another jury, the Court ought to begin the trial again.

It is enough for the purpose of this appeal that there was misreception of evidence which was relevant only to the other indictment. Such misreception is fatal, and the effect is not merely to make the trial a nullity. But the irregularities in this case do not end there. The indictments are before the Court. To one the appellant pleaded not guilty, and on that he was not tried: to the other he also pleaded not guilty, but on that he was tried and convicted. These indictments, however, are worth no more than waste paper. There is nothing on either of them to show that anything took place at all. Until the Evidence Act, 1851, the only evidence of the conviction of an accused person would have been the indictment itself, but by section 13 of that Act it is provided that it is sufficient if it is certified under the hand of the Clerk of the Court or other officer having the custody of the records of the Court where the conviction

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took place that the paper produced is a copy of the record of the indictment, trial, conviction and judgment, omitting the formal parts thereof. Here if the indictment itself, or a true copy of it, were produced, it would have no more value than a piece of blank paper. There is no statement that the appellant has been convicted at all.

Further, it may be observed that it was not necessary that there should be two indictments: there need only have been one.

For the purposes of this appeal, however, it is enough to say that evidence was wrongly admitted, and the conviction must, therefore, be quashed and the appeal allowed.

Two things, however, follow. First counsel for the prosecution should always before opening acquaint themselves with the contents of the indictment by seeing either the actual indictment or a copy thereof; and secondly, where a statement injurious to the prisoner with regard to his previous record is made to the jury and counsel for the defence applies for the trial to be started afresh, the Court should begin the trial afresh before another jury.

Conviction quashed.

NOTE.—The Court (The Lord Chief Justice, Mr. Justice Macnaghten and Mr. Justice Lewis) on November 25, 1935, quashed also the conviction of Florence Rose Nethercott.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MACNAGHTEN AND MR. JUSTICE LEWIS.

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DAVID RONALD MURRAY.

Venue—Committal to Assizes for County other than County where Crime committed—Power to commit to convenient Assizes—Limitation—"Next Assizes"—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 14 (1).

By section 14 (1) of the Criminal Justice Act, 1925:

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"The justices before whom any person is charged with an indictable offence, may, instead of committing him to be tried at the assizes or quarter sessions for a place to which but for this section he might have been committed, commit him to be tried at the assizes for some other place or (if the offence is within the jurisdiction of a court of quarter sessions) at the quarter sessions for some other place if it appears to them, having regard to the time when and the place where the last-mentioned assizes or quarter sessions are to be held, to be more convenient to commit the accused person to those assizes or quarter sessions with a view either to expediting his trial or saving expense: Provided that the power given by this sub-section shall not be exercised—(a) unless the examining justices are satisfied at the date of the committal that the next assizes or quarter sessions to which but for this section he might have been committed will not be held within one month from that date. . . ."

"Next assizes" in the proviso to the above sub-section means "next after the date of committal," and does not include assizes which have already begun.

Where, therefore, a crime was alleged to have been committed in Bedfordshire, and on October 11, 1935, which was Commission Day for the Bedfordshire Autumn Assizes, the examining justices decided to commit the accused person for trial,

Held, as the "next assizes" to which, but for the above section, the accused person might have been committed were not the Bedfordshire Autumn Assizes, but the Bedfordshire Winter Assizes which would be held in January, 1936, and accordingly not within one month from the date of committal, the justices were entitled to commit the accused person for trial to the Northamptonshire Autumn Assizes commencing on October 15, 1935, as being more convenient.

Appeal against conviction.

The appellant was convicted at Northamptonshire Assizes on October 17, 1935, of indecent assault on an adult female, and was sentenced by du Parcq, J., to seven months' imprisonment with hard labour.

Before the appellant pleaded, a motion to quash the indictment was made on his behalf, on the ground that he had wrongly been committed to Northamptonshire Assizes. It was contended that under rule 2 of the Indictments

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(Procedure) Rules, 1933 (St. R. & O., 1933, No. 745 (*a*), made under section 2 (6) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, there was, by implication, power to commit the accused person to the Bedfordshire Autumn Assizes, and that accordingly the proviso to section 14 (1) of the Criminal Justice Act, 1925, was operative to prevent the justices from committing to the assizes for another county.

du Parcq, J., held that the motion failed, and gave judgment in the following terms:

In this case Mr. Elwes has taken a point on behalf of the defendant, and I am very much obliged to him for taking it. He has put it very clearly and very concisely. I think that the point fails, and that the answer made by Mr. Henderson completely disposes of it, but undoubtedly it is a point well worthy of consideration.

The defendant, who has not yet pleaded to the indictment against him, was committed for trial at these Assizes by magistrates in the county of Bedford. In the ordinary way, he would have been committed to be tried at the Assizes for the county of Bedford, but magistrates in these days have power in certain circumstances to commit to assizes other than those to which they would have committed before recent legislation. [His Lordship read section 14 (1) of the Criminal Justice Act, 1925, and continued.] Now in this case the justices committed the accused man to these assizes on what is usually called the Commission Day of the Bedfordshire Assizes, so called, as I understand, because it is the day upon which the Judge may, and in former days habitually did, attend at the Court in order that the Commission might be opened and the work of the assizes begun. It was not, I think, usual

(*a*) Indictments (Procedure) Rules, 1933, r. 2, "Except with the leave of the Judge or Chairman, no bill of indictment shall be preferred at any assizes or quarter sessions after the first working day of those assizes or sessions."

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ever to do much on that first day, except to open the Commission, though I think that at some time it was customary to charge the grand jury upon that day, and I am told by the learned Clerk of Assize, who has great experience in these matters, that it is within his own recollection that as recently as 1895 the Commission was opened by the Judge of Assize on what we now call Commission Day. It has become customary, for reasons of convenience and in order to save the time of Judges and others, to wait until what is commonly called the first working day of the assizes to open the Commission, but I think there is no doubt that the first day of the assizes is Commission Day. Everybody knows that sentences are reckoned from the first day of the assizes, and that means Commission Day, and it may be taken as a general rule that for most purposes, at any rate, Commission Day is the first day of the assizes.

Now the question is: Were the magistrates right in thinking that the next assizes to which but for section 14 of the Criminal Justice Act, 1925, the accused might have been committed would not be held within one month? Mr. Elwes says that they were wrong. He says that the next assizes were the assizes which had then not begun except in the sense that October 11 was their Commission Day. He says that the work had not begun, and that there was no reason why the magistrates should not commit to the assizes on Commission Day. I think that the assizes had begun, and, unless one is to read "the next assizes . . . to which . . . he might have been committed" as including assizes which have already begun, Mr. Elwes' contention on that point must be wrong. He says that the assizes which had begun were assizes to which the magistrates might have committed the accused person, and he prays in aid a rule made by the Lord Chancellor under powers conferred upon him by section 2 (6), of the Administration of Justice (Miscellaneous Provisions) Act, 1933. [His Lordship read the rule and continued.] Mr. Elwes

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says that in the view, at any rate, of the Lord Chancellor who made that rule there was nothing to prevent a committal to assizes, not only after the Commission Day, but after the first working day, provided that the Judge gives the necessary leave for the indictment to be preferred.

In order to see what force there is in that contention, it is necessary to look a little more closely at the law, and to bear in mind the history of these matters. Mr. Henderson has referred me to a provision of an Act of Parliament, which I think is of very great importance in this case. It was provided by section 27 of the Indictable Offences Act, 1848, that "at any time after all the examinations aforesaid"—that is to say, the taking of evidence before the justices—"shall have been completed, and before the first day of the assizes or sessions or other first sitting of the Court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed." That seems to me to make it clear that justices cannot properly commit a man for trial except at such a time as will give him that opportunity which the Legislature has said he must have of procuring copies of the depositions, upon which he has been committed to be tried, and, if justices were to commit him after the assizes had begun, it would be quite impossible for the provisions of that section to be carried out. That section seems to me to throw light upon the intention of the Legislature when they use the words "the next assizes" in section 14 of the Criminal Justice Act, 1925, because I must assume that the Legislature in 1925 were not forgetful of what had been provided by the Legislature in 1848. I must, therefore, read "the next assizes" as meaning assizes which have not yet begun, and which will begin at some time subsequent to the committal. If that is so, the justices seem to me to

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have been right in thinking that the next assizes would not be held within one month from the date of the committal, and that " the next assizes " in this case meant those assizes which will take place at Bedford at the beginning of 1936.

I ought to say something about that rule made by the Lord Chancellor, to which I have been referred. The Administration of Justice (Miscellaneous Provisions) Act, 1933, was an Act which, among other things, abolished grand juries, and so made a very sweeping alteration in the law. Until 1933 it was for the grand jury to decide whether a man should be put upon his trial before the petty jury, and one has to remember that it was not essential that a man should have been committed by magistrates. Of course, by far the greater number of those who come before a Court of Assizes or Quarter Sessions have been committed for trial by magistrates, but it has always been, within certain limits defined by Acts of Parliament, the right of any of His Majesty's subjects to prefer a bill of indictment at assizes, and it used to be for the grand jury to say whether a man should be put upon his trial upon that indictment. There have been cases within the recollection of some of us where magistrates have refused to commit and yet a grand jury have found the bill of indictment to be a true bill, and a man has been put upon his trial. I remember one fairly recent instance at the Central Criminal Court. Now the Act of 1933 had to make provision for cases of that kind, and did so. There are still cases in which magistrates have not committed a man for trial, and yet he may be put upon his trial before a jury. Section 2 (6), of the Act provided that the Lord Chancellor might make rules for carrying that section into effect, and in particular for making provision (a) for the manner in which and the time at which bills of indictment were to be preferred before any Court and (b) the manner in which application was to be made for the consent of a Judge of the High Court or of a Commissioner of Assize for the preferment of

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a bill of indictment. It is plain, I think, that what the Legislature had especially in mind were those cases where magistrates had not committed for trial, but where the new machinery provided by the Act was to be put into force in order that permission might be obtained for a bill of indictment to be preferred. There is no reason to feel any difficulty with regard to the rule made by the Lord Chancellor. I am satisfied, having heard the arguments addressed to me to-day, that what was in contemplation when the Lord Chancellor made the rule was only the case of those indictments which have not been preceded by a hearing before magistrates and a committal by magistrates.

I will say quite frankly that I have granted on other circuits applications made to me during the pendency of an assize for leave to prefer a bill of indictment based upon a committal by justices. I am not sure whether that was a right course to take, but I am satisfied that justices ought not to commit to any assizes which have already begun, for the reason that, if they do so, they are depriving the accused person of his rights under the Act of 1848.

In those circumstances, I think that the committal in this case is right. I think that the justices took the proper course, and that the preliminary objection fails.

The appellant then pleaded not guilty, and was tried upon the indictment, and convicted and sentenced as above stated.

S. Granville-Smith, for the appellant:

The proviso to section 14 (1) of the Criminal Justice Act, 1925, was operative in this case. "Next assizes" in that proviso means "next practicable," and the next assizes to which but for the section the accused person might have been committed were the Bedfordshire Autumn Assizes. October 11 was Commission Day for those assizes, and rule 2 of the Indictments (Procedure) Rules, 1933, by implication, makes it permissible for bills to be preferred

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even after the first working day of any assizes with the leave of the Judge, and this practice has been followed in recent years at Manchester and Birmingham. The rule must contemplate bills being preferred after the first working day of assizes in cases where there has been a committal for trial. If it were intended to refer only to the class of case mentioned in section 2 (2) (b) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, namely where "the bill is preferred by the direction or with the consent of a Judge of the High Court, or pursuant to an order made under section 9 of the Perjury Act, 1911," the provision that the leave of the Judge must be obtained would be unnecessary. du Parcq, J., in holding that it was not possible to commit to the Bedfordshire Autumn Assizes, largely based his judgment on the view that such committal would take away the statutory right given to an accused person under section 27 of the Indictable Offences Act, 1848, of obtaining a copy of the depositions before the first day of the assizes. That provision, however, was made at a time when grand juries were in existence, and the reason for it was to enable an accused person to make a motion that a bill should not be presented to the grand jury, and such considerations no longer apply. If, however, the two statutory provisions are inconsistent, the later must override the earlier. It is to be noted that in section 5 (3) of the Coroners Act, 1887, there is a similar provision that an accused person shall be entitled to a copy of the depositions, but no time limit is there provided.

It is conceded that, if the argument for the appellant is correct, the trial must be regarded as a nullity.

C. L. Henderson, for the Crown, was not called on to argue.

MR. JUSTICE MACNAGHTEN: October 11, 1935, was Commission Day for the Autumn Assizes for the county of Bedford. On that day justices of the peace sitting at

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Bedford decided that the appellant should be committed to take his trial for an indictable offence, and the question arose in what county the trial should take place. [His Lordship read section 14 (1) of the Criminal Justice Act, 1925, and continued.] It appeared to the justices that, in view of the fact that October 11 was Commission Day for the Bedfordshire Assizes, it would be more convenient to commit the accused man for trial at the assizes for the county of Northampton which were to take place within a week.

At Northamptonshire Assizes on October 17 the objection was taken before the Judge on behalf of the appellant that the Bedford justices had no jurisdiction to commit him to those assizes by reason of the proviso to section 14 of the Act of 1925. It was said that the next assizes to which but for the provisions of the section he must have been committed were not the Bedfordshire Winter Assizes in January, 1936, but the Autumn Assizes for that county. The Judge overruled the objection.

This Court has had the advantage of hearing an exhaustive argument on behalf of the appellant, but the point can be dealt with by saying that in the proviso to section 14 the word "next" plainly means "next after the date of committal." Applying that construction in the present case, the next assizes for the county of Bedford were the assizes commencing next after October 11, 1935, that is to say the Winter Assizes which would be held in January, 1936. The justices were, therefore, entitled to commit the accused person to Northamptonshire Assizes, it being plainly more convenient that the trial should take place there than at Bedford in January, 1936.

The appeal must be dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE MACNAGHTEN, MR. JUSTICE GODDARD, AND MR. JUSTICE ATKINSON.

1935.
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JAMES HENRY MILLS.
EDITH MILLS.

Murder—Husband and Wife jointly charged—Summing-up—Defence of Husband not put to Jury—Conviction Quashed.

Conviction of murder quashed in the case of one of two appellants jointly charged, on the ground that his defence had not been adequately put to the jury in the summing-up.

Appeals against conviction.

The appellants, who were husband and wife, were jointly charged at Lancaster Assizes with murder. Both were convicted on October 17, 1935, and sentenced by **Hilbery, J.**, to death.

The appellants, who were both about sixty-two **years of** age, lived alone at 24, John Bright Street, Blackburn. Living next door, at No. 22, was a family named Chester, who had a little girl named Helen, aged three years. That child disappeared on the night of Sunday, June 30, and was never seen again alive. On the early morning of Tuesday, July 2, the child's body was found in the back yard of No 26, John Bright Street, in a very badly burnt condition. Portions of the body and also some articles of clothing belonging to the child were found in various parts of the appellants' house. The case for the Crown was that the child had been murdered by a blow on the head which caused a fracture of the skull. The facts are fully set out in the judgment of the Court.

In dealing with the defence of the appellant James Mills, Mr. Justice Hilbery said in his summing-up: "It has been stated to you, and it is quite right, that the male prisoner, according to the evidence of the witnesses for the prosecu-

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tion, left a house at the other end of the town, somewhere about half-an-hour's walk away, at 7.45, the time he says he passed through the market place and heard a particular councillor getting up to make a speech. That has been, apparently, verified. He said: 'It was ten past eight when I was crossing the market by the Market Square.' He says he got home somewhat about a quarter to nine, and Mr. Pickering, who gave evidence, says to you he was in the front room window at nine o'clock, when he, Pickering, called for Margaret his daughter." After the passage set out in the judgment of the Court, Mr. Justice Hilbery again reminded the jury of both prisoners' statements with regard to their movements at the material time in detail, and continued: "When a person voluntarily makes a statement to a police constable in this country, there is a rule that a police constable should not, and in practice he does not, cross-examine the person upon that voluntary statement. So a voluntary statement made like that should be given all the weight which you think it should. You should consider if it rings true, how far it coincides with the evidence on any particular matters which have satisfied you beyond reasonable doubt. But you must remember that it is not subject to cross-examination, or the tests of cross-examination. Evidence which is given from the witness-box, when a person comes at a trial and gives evidence upon oath, can be cross-examined." His Lordship then commented on the fact that the prisoners had elected not to give evidence.

An application on behalf of James Henry Mills that he should be allowed to give evidence on the hearing of the appeal was refused.

W. Gorman, K.C., for the appellant, James Henry Mills:

The evidence was that the appellants' house was used as a kind of meeting-place for all the children of the neighbourhood. Helen Chester was last seen at 7.40 p.m. on the

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night of June 30 playing in the vicinity of the appellants' house, and she was found to be missing about 7.45 p.m. the same night. A child aged five, named Margaret Pickering, had been seen to go into the appellants' house about 7.45 p.m., and remained there till 9 p.m., when she was fetched by her father. James Mills, who had left home after tea and did not return until about 8.15 p.m. or 8.30 p.m., gave an account of his movements to the police, which the police said was correct in so far as it could be checked. The case for the Crown was that, at the time when Mr. Pickering went to the appellants' house, Helen Chester was there, dead or alive. If she was then alive, Margaret Pickering must have known of her presence and would naturally tell her father. If, however, she was then dead, she must have met her death before Margaret Pickering went into the house, as it was inconceivable that she should have been killed while Margaret Pickering was there without Margaret Pickering knowing about it, and the evidence was that James Mills was not in the house at that time. The summing-up was unsatisfactory in that it never left to the jury the possibility that the child might have been murdered at a time when James Mills was not in the house, and did not make it clear that the jury might convict one prisoner and acquit the other.

Glynn Blackledge, for the appellant, Edith Mills:

The time at which the child met her death cannot be fixed with any precision, and, though there was evidence that Mrs. Mills was in or near the house during part of the time within which death may have taken place, she was there subject to the disability of being seriously deaf. Even if there was evidence that the child was murdered by one of the appellants, the jury should have been very carefully directed that, before they could convict, they must be able to fix one of the appellants with guilt and to conclude beyond reasonable doubt which one that was. The Judge

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was perfectly entitled to comment on the fact that neither appellant had given evidence, but he should have told the jury that an innocent person may desire to keep silent in order to avoid incriminating a fellow-prisoner, especially where the relationship of husband and wife exists.

J. Jackson, K.C. (*Hartley Shawcross* with him) for the Crown:

The evidence left it very uncertain both at what time the child arrived at the appellants' house and at what time James Mills came home. The jury were entitled to look at all the circumstances of the case and the conduct of both appellants, and draw inferences therefrom. The summing-up might have been expressed in rather different terms, but it left to the jury all the materials which they ought to consider.

Glynn Blackledge, in reply:

The jury recommended Edith Mills to mercy, and they must, therefore, be presumed to have taken the view that she was acting only as an aider and abettor to her husband. If the Court decides to quash the conviction of the husband, the conviction of the wife ought, therefore, not to stand.

At the close of the arguments Mr. Justice Macnaghten said that in the opinion of the Court the conviction of James Henry Mills must be quashed, but the conviction of Edith Mills must stand. The Court would give their reasons for their decision on the following morning.

November 22. MACNAGHTEN, J.: The two appellants, James Henry Mills and his wife, Edith Mills, both over the age of sixty, lived alone at 24 John Bright Street, Blackburn. Next door to them, at No. 22, lived a Mr. and Mrs. Chester, who had an only child, Helen, some three years of age. On the evening of Sunday, June 30, the child did not return home, and search was made for her all that night and

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during the following day. On the morning of the Tuesday following, July 2, the half-burnt body of the child was found wrapped in a parcel in the back yard of No. 26 John Bright Street, which adjoined the back yard of the appellants' house. The two back yards were separated by a brick wall and there was evidence which indicated that the parcel had been thrown from the back yard of No. 24 into the back yard of No. 26. Medical examination of the body of the child revealed the fact that the burning had taken place after death, and that the death had certainly been caused by a violent blow struck on the back of the child's head, piercing the bones of the skull.

In these circumstances the two appellants were arrested and charged with the murder of the child. The case came on for trial before Mr. Justice Hilbery at the Lancaster Assizes in October, 1935, and both the appellants were convicted of murder.

The case for the Crown was based upon the following propositions: that the child had entered No. 24 John Bright Street on the evening of June 30 alive; that she was killed by an intentional act of some person in that house using a coal hammer and striking a violent blow on the back of her head; that at the time when the child was killed both the appellants were in the house and no one else, and that on the following day, fearing that their house might be searched, they endeavoured to cremate the body of the child on their kitchen fire with the object of destroying the evidence of the crime. The prosecution submitted that, in the absence of any credible explanation, the irresistible inference which the jury ought to draw from those facts was that both had been concerned in the murder of the child and both were guilty. The evidence adduced on behalf of the Crown established that the child was last seen alive in the vicinity of 24 John Bright Street at about twenty minutes to eight on the evening of June 30. The medical evidence was amply sufficient to establish that the cause of

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death was a violent blow struck with some such instrument as a coal hammer. The evidence of the burning of the body on the kitchen fire and a number of gruesome details, which it is unnecessary to recapitulate, indicated that both appellants were privy to the burning of the body. At the conclusion of the case for the prosecution counsel representing the appellants submitted that, even if the proper inference from the facts as proved was that the child had been murdered, it was improbable that two persons would be concerned in so horrible a crime; that if only one was concerned, the evidence for the Crown left it in doubt which was the guilty party, and that, therefore, there being a reasonable doubt whether the one or the other had committed the crime, the case ought to be withdrawn from the jury and a verdict of acquittal entered. In our opinion, the learned Judge was quite right in rejecting that submission, and in saying that, on the facts as proved by the prosecution, there was a case to go to the jury, on which it would be open to them to find that, if the facts relied upon by the prosecution were established beyond reasonable doubt to their satisfaction, murder had been committed by both appellants.

The case went to the jury. Neither of the appellants gave evidence, and accordingly, after the closing speech by counsel for the Crown, counsel for the appellants addressed the jury, and the Judge summed up.

In order to establish the case against both appellants, it was plainly necessary to prove that both were in the house at the time when the blow was struck.

The child, according to the evidence, was last seen alive at twenty minutes to eight on Sunday evening. The mother, Mrs. Chester, was the last person who saw her alive.

[His Lordship then referred in detail to Mrs. Chester's evidence and continued.]

According to the evidence of a Mrs. Farnworth, who lived at 26 John Bright Street, Margaret Pickering, a child

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of five years of age, was seen by her to go into the appellants' house at a quarter to eight, just at the time when, according to the evidence of Mrs. Chester, she missed her daughter, Helen. At nine o'clock the father of Margaret Pickering went to No. 24 John Bright Street and brought her away. The evidence was, therefore, that from a quarter to eight until nine o'clock Margaret Pickering was in the house with the female appellant. Margaret Pickering was not called as a witness. It is reasonable, however, to assume that in a case such as this the police had made every effort to find the person who had last seen Helen Chester alive, and that Margaret Pickering did not, during the hour and a quarter that she was in No. 24 John Bright Street, see Helen Chester.

In his opening speech to the jury, counsel for the Crown submitted that the evidence would show that, at the time Margaret Pickering was in the house, Helen Chester must have been there dead or alive. If she was there, it seems impossible to resist the conclusion that she must have been dead. It is difficult to believe that a small child of three years of age could be in that small house for all that time and Margaret Pickering not be aware of the fact, if the child was alive.

The case submitted on behalf of the male appellant, apart from the submission which I have already mentioned, was that, even if the jury were satisfied as to three of the four propositions put forward on behalf of the Crown, they could not be satisfied that the male appellant was in the house at the time when the crime was committed, because Helen Chester might have gone into that house and might have been murdered before Margaret Pickering went there; and that, if that was the case, then it was established conclusively by the evidence for the Crown that the male appellant was not in the house when the crime was committed.

A Mrs. Pennington was called as a witness for the Crown, and she proved that at about a quarter to eight on that

evening the male appellant was at No. 33 Coniston Road, a place in Blackburn from which it would take at least half an hour to walk to John Bright Street. Therefore, if Helen Chester had been killed before Margaret Pickering entered the house, his innocence of the crime was in fact conclusively established. This point, that the evidence for the Crown failed to show that the male appellant was in the house when the crime was committed, was put forward by Mr. Gorman on his behalf, but it was no part of his duty to press it to the inevitable conclusion that, if that fact were established, the guilt of the female appellant was patent beyond doubt.

If the child entered the house after Margaret Pickering left at nine o'clock, it follows from that that this small child of three, for whom her mother and father and the police and neighbours were all looking, must have been hiding somewhere where she could not be found for the space of an hour and a quarter, and then, while the neighbourhood was still being searched for her, must have emerged from her hiding-place and gone unobserved by anyone into the appellants' house. That is a conclusion which it is certainly very difficult to accept. The evidence of the mother that at twenty minutes to eight she saw the child in the street near the appellants' house and that five minutes later the child was missing is certainly far more consistent with the view that the child went into the house before and not after Margaret Pickering went there.

Some criticism has been made of the summing-up, and it has been urged that the jury were not told that it was open to them to find one prisoner guilty and acquit the other. That is a criticism which we do not think well-founded. Again and again the learned Judge, in a most careful summing-up, pointed out that the burden of proof was on the Crown; and that it was for the Crown to satisfy the jury beyond all reasonable doubt that murder had been committed and that one or other of the prisoners or, if they were

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acting together, both, had committed the crime. He said that more than once, and those words intimate as plainly as words can that it was open to the jury to find one of the prisoners guilty and the other innocent. But the learned Judge, in his summing-up, did not point out to the jury the defence put forward on behalf of the male appellant. He did not point out to them that, if the child entered the house before Margaret Pickering came there, and was killed, she was killed when the male appellant was not in the house and the case for the Crown as against him failed. Not only was that not pointed out to the jury, but in the course of the summing-up the learned Judge, after dealing with the facts relied upon by the Crown, said: "There is the evidence, members of the jury. If you think you are satisfied on those questions in one way, the way the prosecution urge upon you, the child must have arrived in the house alive; its skull is fractured in the house by a blow of direct and considerable violence, struck in the house. If you think it was done in that house, unless it was done at the time Margaret Pickering was there"—a suggestion which was not put forward, and, indeed, it would seem beyond belief that it could have been done when Margaret Pickering was there—"it must have been done at the time when only the two prisoners were there."

On the ground that the defence put forward on behalf of the male appellant was not put to the jury in the summing-up, and that the sentence to which I have referred excludes that defence from their consideration, we are of opinion that the conviction of the male appellant must be quashed.

So far as the female appellant is concerned, we think that the learned Judge was right in rejecting the submission made to him at the close of the evidence for the prosecution. There was, in our opinion, ample evidence against her and we see no ground for interfering with the conviction in her case.

One conviction quashed.
One appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GODDARD AND MR. JUSTICE SINGLETON.

THOMAS POMEROY.

1935.
9 *December.*

Motor-car Offences—Dangerous Driving—Driving while disqualified for holding Licence—Charges not to be tried together—Charge of Manslaughter to be preferred where warranted by Evidence—Consecutive Sentences.

Charges of dangerous driving and of driving while disqualified for holding a licence should not be tried together.

Observations on the propriety of preferring a charge of manslaughter and not merely a charge of dangerous driving when the major charge is warranted by the evidence and on consecutive sentences.

Appeal against conviction and application for leave to appeal against sentence.

The appellant was convicted at West Kent Quarter Sessions on October 17, 1935, of driving a motor vehicle in a manner dangerous to the public and of driving while disqualified for holding a licence. He was sentenced by the Chairman to concurrent terms of two years' imprisonment and six months' imprisonment, in each case with hard labour, and was also ordered to pay the costs of the prosecution and was disqualified for holding a licence for life.

When driving a motor-car along a road in Kent, the appellant ran on to the greensward at the side of the road and collided with a group of hop-pickers, killing one of them, a woman. He jumped out of the car and disappeared, and afterwards attempted to throw dust in the eyes of the police by causing a bogus letter to be posted from South Wales purporting to be written by the driver.

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At the trial the appellant was defended by counsel, and the two charges were tried together, no application having been made to the Court that they should be tried separately.

Martin O' Connor, for the appellant:

The two charges should have been tried separately, because the reference to the fact that the appellant was at the time under disqualification for holding a licence would lead the jury to infer that he had been convicted of some motoring offence and would be calculated to prejudice the appellant on the charge of dangerous driving. If the charges were properly tried together, the jury should have received some warning which would dispel that prejudice.

On being asked by the Court whether he desired to persist in the application for leave to appeal against sentence, counsel intimated that he did not.

G. G. Raphael, for the Crown, was not called on to argue.

GODDARD, J. [after stating the facts]: For some reason which this Court cannot understand but which is to be deplored, if not censured, the magistrates committed the appellant to Quarter Sessions, merely on charges of driving to the danger of the public and driving while disqualified, instead of to the Assizes on a charge of manslaughter. When I say that the appellant has no fewer than twenty convictions against him for road traffic offences, besides eleven convictions for larceny, wounding and assault, it is difficult to conceive how any magistrates could have thought this was a proper case to be dealt with on a minor charge. If he had been sent to Assizes it is possible, if not probable, that he would have received a long term of penal servitude.

The only complaint made with regard to the trial is that the two charges of dangerous driving and of driving when

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disqualified were tried together. While it was possible in law to adopt that course, it is, in the opinion of the Court, undesirable that that course should be adopted in a case such as the present, because, although no details were given with regard to the reason why the appellant was disqualified for holding a licence, the mere mention of the fact that he was disqualified might, and probably would, indicate to the jury that he had been convicted of some motoring offence of a more or less serious character. In the present case, however, there has been no miscarriage of justice, because the appellant's defence was not that he was not driving dangerously, but that he was not the driver of the car in question. Further, though the appellant was defended by counsel of experience, no application was made to the Court that the two counts should be tried separately, and it is too late to take such a point on appeal. The appeal against conviction must, therefore, be dismissed.

The application for leave to appeal against sentence has been abandoned by the appellant's counsel. For the offence of driving to the danger of the public he was given the maximum sentence the magistrates had power to inflict, and the magistrates were emphatically right, although that sentence, in the opinion of the Court, is really inadequate for the gross nature of this case, and that is the reason why he ought to have been tried for manslaughter.

[His Lordship reviewed sentences for motoring offences passed on the appellant, which included fines and short terms of imprisonment for dangerous driving and driving under the influence of drink, and continued.] If such sentences are to be passed upon road ruffians of this description it is almost hopeless to suppose that there will be any safety upon the roads.

On the charge of driving when under disqualification the Court passed a sentence of six months' imprisonment with hard labour, and they appear to have thought they could not make that sentence consecutive to the sentence of two

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years' imprisonment with hard labour for dangerous driving, but, had they done so, it is probable that this Court would not have interfered.

Appeal dismissed.

Solicitors—Edmond O'Connor & Co., for appellant.

NOTE ON CONSECUTIVE SENTENCES.—At the Sussex Autumn Assizes, 1935, Humphreys, J., passed consecutive sentences of two years' imprisonment with hard labour for attempted rape and six months' imprisonment without hard labour for larceny on a prisoner named George Smith. There was no appeal. See also MORRISS, [1926] 19 Cr. App. R. 75, which was decided before the passing of the Penal Servitude Act, 1926; and DUFFY, [1931], Ir. Rep. 148, where the English authorities on this matter are reviewed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MACNAGHTEN AND MR. JUSTICE DU PARCQ.

1936.
13 *January*.

ARTHUR CHARLES MORTIMER.

Evidence—Similar Acts by Prisoner—Murder—Deliberate Knocking down of Woman by Motor-Car—Similar Attacks on Other Persons—Admissibility.

The appellant was charged with murder, the allegation of the prosecution being that he had knocked down a woman cyclist by deliberately driving a motor-car at her. Evidence was admitted to the effect that shortly before the occurrence which was the subject of the charge he had knocked down two other women cyclists in a similar way and had stopped his car and assaulted them, and that

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shortly afterwards he had knocked down another woman cyclist and stolen her bag.

Held, the evidence was properly admitted, on the principles laid down in MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES [1894] A. C. 57 and BOND [1906] 2 K. B. 389, as being relevant to establish the guilty intent of the appellant either to kill or to cause grievous bodily harm to the woman who was killed by the motor-car.

Appeal against conviction.

The appellant was convicted at Hampshire Assizes on November 27, 1935, of the murder of a woman named Phyllis Mary Doreen Oakes and was sentenced by Finlay, J., to death.

The following short statement of facts is taken in substance from the judgment of the Court, where the facts are more fully set out:

The case for the prosecution was that at about 9.25 a.m. on the morning of August 8, 1935, the appellant knocked down Miss Oakes when she was riding her bicycle by deliberately driving a motor-car at her. Evidence was called to show that at about 6.30 p.m. and 7.15 p.m., respectively, on August 7 the appellant had knocked down two other women cyclists in a similar way, and had stopped his car and assaulted them. Evidence was also given that at about 3.30 p.m. on August 8 he had knocked down another woman cyclist and stolen her handbag, and that he had subsequently driven straight at three different parties of police officers who had tried to stop the car. Objection was taken to the tendering of the above evidence, but was overruled.

F. J. Tucker, K.C., (*D. M. Wilson* with him), for the appellant:

The facts of this case, so far as the knocking down of Miss Oakes is concerned, do not establish a *prima facie* case of murder, and it is submitted that a *prima facie* case must be made out before other evidence can be admitted to

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support a charge of murder. Other evidence was admitted in this case, the evidence of Mrs. Series and Miss Boyes as to incidents which happened before the occurrence which was the subject of the charge, and the evidence of Miss Harwood and Mrs. Skeet as to incidents which happened after that occurrence.

With regard to Mrs. Series' evidence, that is not admissible because it related *inter alia*, to an assault with fists, of a kind different from the other incidents. As to Miss Harwood, there is no evidence to show how the occurrence happened, and in any case her evidence also dealt with quite a different type of offence, namely, larceny. Mrs. Skeet's evidence is inadmissible for two reasons. First, no harm was done to her by the car, and secondly, her evidence as to the subsequent assault related to quite a different kind of offence.

Such evidence is obviously prejudicial to the accused and should not be admitted unless it is relevant to an issue which has been actually raised, such as guilty knowledge, or intent, or system. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose, and the prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice; see *per* Lord Sumner in THOMPSON (13 Cr. App. R. 61, at p. 78; [1918] A. C. 221, at p. 232). [He also cited MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES, [1894] A. C. 57, at p. 65.] It is submitted, therefore, that evidence of this kind should not be admitted unless the other evidence establishes a *prima facie* case against the accused person, or, in other words, the prosecution should not be allowed to "make" a case against an accused person by such evidence. In any case, even if such evidence is admitted, it should be limited to evidence of the same kind of offence or an attempt to commit the same kind of offence, and not extended to evidence of different kinds of offences.

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J. G. Trapnell, K.C., and *L. R. Dunne*, for the Crown, were not called on to argue.

THE LORD CHIEF JUSTICE: The appellant, Arthur Charles Mortimer, was convicted at Winchester Assizes of the murder of a woman named Phyllis Mary Doreen Oakes. He was sentenced to death and now appeals against conviction. The only ground of appeal is that the learned Judge admitted evidence of, or relating to, events which occurred, or are alleged to have occurred, on August 7, 1935, and the afternoon of August 8, 1935. This evidence, it is said, prejudiced the appellant's case and caused the jury to take into consideration irrelevant matters. It is to be observed that the grounds of appeal make no reference at all to the suggested defence of insanity, nor is there any complaint at all with regard to the summing-up of the learned Judge upon that or any other issue. No question any longer arises upon the topic of insanity; the only question is with regard to the admissibility of certain evidence.

[After stating the facts substantially as set out above, His Lordship continued:]

The evidence went to show that on August 7, 1935, between a quarter to three and four o'clock in the afternoon, a Morris-Oxford saloon car bearing the number AGJ 825 was taken from the High Street, Aldershot. At a quarter to nine next morning, the appellant, a soldier, was seen in barracks at Aldershot, but failed to appear at a parade at nine o'clock that morning. At a quarter past nine a man wearing a blue shirt and khaki trousers was observed as he drove a car near Winchfield Station. He passed and re-passed a labourer, who happened to notice the number of the car, which he believed was BGJ 825. On the same road two sisters, one of whom was the woman now dead, were riding bicycles, and as they reached a railway bridge they changed into single file. A motor-car overtook them from behind, and swept up the one who was

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at the back, and carried her and her bicycle along on or about the bonnet of the car. First of all the girl herself and then the bicycle fell on to the road, and the car drove off at speed. The evidence was that the car was a dark saloon car, as was the car AGJ 825, but the surviving sister could not take particulars of the car or the driver. The collision took place, according to the evidence, at about twenty-five minutes past nine in the morning, and the girl who was injured died two days later. Another cyclist saw the car carrying Miss Oakes' bicycle on the bonnet, the bicycle drop off, and the car sweep on towards a place called Odiham. That witness could not identify the car nor the driver. A sign painter at Crondall crossroads, further down the road which was taken by the car, said that he noticed a man with frizzly hair and wearing a blue shirt, driving a dark saloon car at about twenty minutes to ten that morning, and that he believed that the number of the car was AG 825 or 285, but the car, he said, was being driven at an excessive speed. That car was found the same afternoon on Ash Ranges with a damaged mudguard and with the front lamp and width indicator missing, and upon it were some very fine and very fair hairs. The woman who is now dead was a fair-haired woman. The appellant admitted sooner or later that he had driven the car, and, in fact, an ignition key which fitted it was found in his pocket. It was, therefore, of crucial importance to examine the intent with which the appellant had done that which he had done, and accordingly evidence was offered tending to show that for some reason at this time the appellant had, so to speak, run amok in this way. Evidence was offered and heard that at about half-past six on the evening before this occurrence a motor-car met a woman cyclist between Heckfield and Strathfieldsaye in the same neighbourhood and swerved across the road towards her and knocked her into the ditch. The car was backed to the point where she had just got up, the driver apologised and said that the

steering had jammed, and then he struck the woman in the face several times with great violence and drove off. The woman took the number of the car and reported the matter to the police. There was an immaterial error as to the number, but the woman who had been hit picked out the appellant without hesitation at an identification parade a fortnight afterwards.

To return to the evening of August 7, according to the evidence admitted after objection, about a quarter past seven that evening a man wearing a blue suit and a blue shirt drove the same car into a woman cyclist near a place called Dogmersfield, and knocked her off. He backed his car on to the wheel of the cycle, picked the woman up and tried to put her into the car, and on that occasion the lamp and the width indicator were knocked off.

At about a quarter to three in the afternoon of August 8, an Austin saloon car No. ACG 554 was taken from Farnborough, and at about half past three in the afternoon a woman cyclist was knocked down in the road near Knapphill. There was no direct evidence that the appellant was the man who knocked the woman down, but he admitted that he was the man who took the woman's bag; he said that he had found the bag lying by her in the road. Finally, a few minutes before four that afternoon this latter car, ACG 554, was seen on the road from Worplesdon to Guildford. The driver avoided a police car by driving upon the footpath, and drove off at a high speed towards Guildford, pursued by the police car. A police constable tried to stop the car, but had to jump for his life, as also had three other officers at a bridge further on. The evidence was that the car was driven at a great speed, and with skill. Another officer narrowly escaped being run over, and the car finally came into collision with another car in the High Street, Guildford, and then had to stop.

The appellant was seen on the following afternoon by police officers. He had been driving this car, and had the

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handbag of the last-mentioned cyclist. He had received a blow on the chin, and was somewhat dazed. In his pocket was the ignition key of the car which had knocked down Miss Oakes. He was cautioned, and denied that he had knocked down a girl, but said that he had found her in the ditch and picked up her handbag in the road and had driven on because he thought he would be blamed. On the following afternoon he was seen by police officers. At ten minutes to four he was spoken to about the incident at Heckfield, and with regard to that he said that he had stolen the car on that day, and had knocked down a woman, and that it was because of drink or the heat; he also said that he suffered from fits. A few minutes later other officers informed the appellant that they were enquiring about two ladies who were knocked off their bicycles at Dogmersfield and Winchfield, the latter being Miss Oakes, and he admitted taking and driving the car concerned at Dogmersfield. He said he could not remember the car concerned at Winchfield, and then he burst into tears and said everything went blank, and he did not know what he had done.

Now the whole point of what has been urged so well by Mr. Tucker in this appeal is that this evidence relating to matters other than the collision with the bicycle of Miss Oakes ought not to have been admitted. It is said that this evidence, admitted as it was, went beyond the principle governing, as the well-known cases show, the admissibility of evidence of such a character. The rule has been stated again and again, but never perhaps more clearly than in the well-known words of Lord Herschell in MAKIN v. ATT.-GEN. FOR NEW SOUTH WALES, [1894] A. C. 57. At page 65 Lord Herschell said this: "The mere fact that the evidence adduced tends to show the commission of other crime does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or acci-

dental, or to rebut a defence which would otherwise be open to the accused."

It appears to us that it was of crucial importance to show that what was done in relation to Miss Oakes was deliberately and intentionally done. If the defence was to be, as indeed it proved to be in one of its aspects, that what was done amounted to no more than manslaughter, it was manifestly fundamental to establish the guilty intent of the prisoner either to kill or, at any rate, to cause grievous bodily harm. It seems to us that the evidence which was admitted in spite of the able criticisms of Mr. Tucker was of the very kind which in such a case was proper to be admitted. Undoubtedly where such evidence is offered, great responsibility lies upon the Judge, and as was said by Bray, J., in BOND, [1906] 2 K. B. 389, at p. 417, in view of the strong prejudice that would necessarily be created in the minds of the jury by evidence of this class, which shows that the prisoner has been guilty on another occasion of a similar offence, the greatest care ought to be taken to reject such evidence unless it is plainly necessary to prove something which is really in issue. In our opinion, this evidence satisfies that test; it was plainly necessary to prove something which was really in issue, namely, the intent with which the prisoner did the act, if he was the person who did it.

It was faintly suggested at the beginning of Mr. Tucker's argument that the evidence of identification here was shadowy and insufficient. In our opinion there was ample evidence to go to the jury that this was the man who committed the act. No complaint is made either as to the nature of the evidence upon the topic of insanity, where, of course, the burden of proof rested with the defence, or upon the way in which the learned Judge dealt with that issue. No question of insanity arises on this appeal.

I would only add that it is a matter for congratulation that a learned counsel as busy as Mr. Tucker should be

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ready and willing to devote his services to the defence of a poor prisoner in such a case. He has given the Court the greatest assistance, and we are indebted to him.

The appeal is dismissed.

Appeal dismissed.

BEFORE

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FREDERICK ROBERTS.

Evidence—Character of Prisoner—Cross-Examination as to Previous Conviction—Evidence by Prisoner against Co-Prisoner—Different Offences Charged—Conviction Quashed—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 7), *s.* 1 (*f*).

The appellant, who was charged with the fraudulent conversion of a sum of money entrusted to him by S., was joined in an indictment with another prisoner M., who was charged with causing sums of money to be paid by S. to the appellant by means of false pretences. During the course of the trial the appellant gave evidence against M., and was cross-examined by M.'s counsel as to a previous conviction.

Held, as M. was not an "other person charged with the same offence" as the appellant, the cross-examination was not rendered admissible under proviso (f) (iii) of the Criminal Evidence Act, 1898, and should not have been admitted, and the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at London Sessions on December 12, 1935, of fraudulent conversion, and was sentenced by the Deputy-Chairman to three years' penal servitude.

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The appellant was jointly indicted with a prisoner named Moore, the appellant being charged with the fraudulent conversion of a sum of money entrusted to him by a Mrs. Steel, contrary to section 20 (1) (iv) (a) of the Larceny Act, 1916, and Moore being charged in two counts with causing by false pretences two distinct sums of money to be paid by Mrs. Steel to the appellant, contrary to section 32 (1) of the same Act. The false pretences alleged in each count were the same. The appellant, who was not defended by counsel, had said in his evidence-in-chief that certain documents had been signed by Moore in his presence, which Moore strenuously denied. Subsequently the appellant was cross-examined by Moore's counsel as to a previous conviction for forgery, which the appellant admitted. The Deputy-Chairman referred to this matter in his summing-up.

Douglas Potter, for the appellant, was not called on to argue.

John Maude, for the Crown, did not seek to support the conviction.

TALBOT, J.: In this case two prisoners were joined in one indictment. The appellant was charged with fraudulently converting certain property entrusted to him by a Mrs. Steel in order that he might apply the same for the payment of a quarter's rent of a house taken by her. That was an offence against section 20 (1) (iv) (a) of the Larceny Act, 1916. His co-defendant, John Moore, was indicted under section 32 (1) of the same Act for causing by false pretences moneys to be paid by Mrs. Steel to Frederick Roberts, and also with another offence against the same sub-section relating to the same parties but a different sum of money, the false pretence alleged being the same in both cases.

During the course of the trial the appellant was cross-

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examined as to a previous conviction by Moore's counsel. The appellant had provoked that question by stating—whether truly or not it is unnecessary to consider—that Moore had signed certain documents in the appellant's presence. This Moore denied and implied that the appellant had forged his signature. The question was asked after the appellant had been duly prepared for it, and the matter was mentioned by the Judge in his summing-up. It never seems to have struck anyone that there was any difficulty about the matter.

The appellant now appeals against conviction on the ground that it is improper to cross-examine a prisoner under trial as to a previous conviction except in certain limited circumstances defined by the Criminal Evidence Act, 1898. By that Act persons indicted for crimes were allowed to give evidence on their own behalf and were put generally on the footing of ordinary witnesses—a course which had already been taken in certain particular cases. They were not, however, put for all purposes on the footing of ordinary witnesses, and were protected against certain questions, including questions about any previous conviction. That harmonises with and follows one of the most cardinal principles of the criminal law, that a prisoner is to be tried on the question whether it is sufficiently proved that he has committed the offence with which he is then charged, and it cannot be suggested to the jury, directly or indirectly, that he is likely to have committed it because he has already done something of the same kind.

To the general rule there are, however, certain exceptions, and it is upon one of these that the question in this case arises. By section 1 proviso (f) of the Criminal Evidence Act, 1898: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is

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then charged, or is of bad character, unless . . . . (iii) he has given evidence against any other person charged with the same offence." That proviso must be strictly construed. One can easily conceive an argument for making the rule more extensive—that is to say, for allowing a further exception to the exemption of prisoners from this particular line of cross-examination, but one must interpret the Act as it is. That brings the Court face to face with the question whether the offence with which Moore was charged was the same as that with which the appellant was charged. It is quite clear that it would be impossible to say that the offences were the same, and counsel for the Crown very properly has recognised this. This is a fatal bar to the correctness of the conviction. The conviction must be quashed and the appellant discharged.

Conviction quashed.

Solicitors—Solicitor for Metropolitan Police, for the Crown.

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JACOB GOLDFARB.
ARTHUR JUDAH SZCZENSLIVE.

1936.
10 *February.*

Alien—Recommendation for Deportation Order—Stateless Person—Impossibility of executing such Order—Belief Recommendation would facilitate Order of another kind—Restrictions on Aliens resident in England—Recommendation quashed—Aliens Order, 1920 (*St. R. & O.* (1920), *No.* 448, *as amended by No.* 2262), *arts.* 11 *&* 12.

Two aliens, who were stateless persons of Russian origin, were convicted of receiving stolen property. It was realised

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that in neither case could a deportation order be effectively made by the Secretary of State, but it was represented to the Judge on behalf of the police that, if he made recommendations for deportation orders, the Secretary of State would be thereby assisted towards making orders under art. 11. of the Aliens Order, 1920, which empowers the Secretary of State to impose on any alien or class of aliens in this country restrictions as to residence, reporting to the police, registration, etc. The Judge accordingly made recommendations for deportation orders in both cases.

Held, it was not proper to make such recommendations in the above circumstances, and the recommendations must be quashed.

Appeals against recommendations for deportation orders.

The appellants were convicted at the County of London Sessions on December 12, 1935, of receiving stolen property. Goldfarb was sentenced to twelve months' imprisonment, and Szczenslive to eighteen months' imprisonment, in each case with hard labour, and in each case the Deputy-Chairman made a recommendation for a deportation order.

The following matters were brought to the attention of the Deputy-Chairman after verdict and before sentence. Goldfarb was born at Riva (formerly in the Russian Empire, but now in Poland) in 1892. He came to England in 1914, had married a foreigner in England and had five children, the eldest of whom was eighteen years of age, and all of whom were of British nationality. He had not been previously convicted. Szczenslive was born at Vilna (formerly in the Russian Empire, but now in Lithuania) in 1905. He came to England in 1914. He was a married man with one child, but was living apart from his wife. He had not been previously convicted. Both prisoners were originally of Russian nationality, but had lost that nationality and had not acquired any other and were, therefore, stateless persons. No deportation order could effectively be made by the Secretary of State in either case, as the authorities of Soviet Russia refuse to admit into their territory ex-Russians who

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have lost their Russian nationality. It was, however, represented to the Deputy-Chairman on behalf of the police that, if he were to make recommendations for deportation orders, the Secretary of State would be thereby assisted towards making orders under art. 11 of the Aliens Order, 1920 (*a*), and he accordingly made the recommendations.

On February 3, 1936, the Court—Mr. Justice Talbot, Mr. Justice Macnaghten and Mr. Justice du Parcq—heard an application made by Marston Garsia, counsel then appearing for Goldfarb, for leave to appeal against sentence and an application by Szczenslive, who was not represented, for leave to appeal against conviction and sentence. They refused Szczenslive's application for leave to appeal against conviction and both applications for leave to appeal against the sentences of imprisonment, but granted leave to each

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(*a*) By the Aliens Order, 1920, Art. 11 :—

"The Secretary of State may by order impose on any alien or class of aliens such restrictions (either in addition to or in substitution for the other restrictions imposed by this order) as to residence, reporting to the police, registration, the use or possession of any machine, apparatus, arms and explosives, or other article, or otherwise, as he may deem to be necessary in the public interest, and any alien in relation to whom any such order is made shall comply with the terms of the order."

By Art. 12 (6) the Secretary of State is empowered to make a deportation order in any of the following cases : (a) "if any Court certifies to the Secretary of State that the alien has been convicted . . . by that Court [of certain specified offences] and that the Court recommends that a deportation order should be made in his case either in addition to or in lieu of sentence . . . (c) if the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien."

By Art. 12 (7) : "Where any case in which a Court has made a recommendation for deportation is brought by way of appeal against conviction or sentence before any higher Court, and that Court certifies to the Secretary of State that it does not concur in the recommendation, such recommendation shall be of no effect but without prejudice to the power of the Secretary of State to make an order of deportation under the last-foregoing provision."

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applicant to appeal against the recommendation for deportation.

T. R. Fitzwalter Butler (*Marston Garsia* with him), for the appellant Goldfarb:

Goldfarb is a stateless person, and no effective deportation order could be made against him. The recommendation for a deportation order, therefore, should not have been made. It was made because it had been represented to the Deputy-Chairman that the Secretary of State would be thereby assisted to make an order under art. 11 of the Aliens Order, 1920, but in making such an order the Secretary of State acts *proprio motu* and his powers are not related to proceedings in any Court. Further, in view of the appellant's long residence in this country without any conviction being recorded against him, and in view of the fact that he has five young children living here, a recommendation for a deportation order was not in any event appropriate in his case. [He was stopped.]

The appellant Szczenslive in person.

G. G. Raphael, for the Crown:

It has been the practice to draw the attention of the presiding Judge to the fact of a convicted prisoner being an alien, and it may be a matter of convenience to the Home Office to know the view of the Judge with regard to every such case, as the Judge is not in a position to determine whether a deportation order can be made effective or not.

TALBOT, J.: These two appellants were both convicted at the County of London Sessions of receiving stolen goods well knowing them to be stolen. The only matter with which this Court is concerned to-day arises because there was in each case, in addition to a sentence of imprisonment, a recommendation that an order for deportation should be made by the Secretary of State, who has power, if he thinks fit, to make such an order. We have been informed that by

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reason of the appellants' place of origin there was no practical mode by which an order for deportation could be executed, and it appears to be clear from the record of the proceedings that the Deputy-Chairman included those orders in the sentences because he was informed on behalf of the police that such a course would facilitate the making of quite a different class of order by the Secretary of State. By art. 11 of the Aliens Order, 1920, which has statutory authority, the Secretary of State is empowered to impose by order on an alien such restrictions "as to residence, reporting to the police, registration, the use or possession of any machine, apparatus, arms and explosives, or other article, or otherwise, as he may deem to be necessary in the public interest," and, if he does so, an alien has to comply with the terms of the order. Such an order has obviously nothing to do with deportation, because it would be carried into effect not in any foreign country to which deportation might be ordered, but in this country. Nor has it anything to do with conviction or intervention by any Court; it relates to a power conferred on the Secretary of State as such, and there is no restriction other than the terms of the article itself to fetter his discretion in the matter.

In the present case, there was not a mere expression of opinion on the part of the Deputy-Chairman, but the formal act of a recommendation to the Secretary of State to make a deportation order, which for all practical purposes he had no power to make, so that he might be more likely to make an order under art. 11. The Court is of opinion that that was a very unsatisfactory way of dealing with any case. Though there is nothing to prevent a judge from indicating his opinion of the case when passing sentence on an alien who has been convicted, yet once it has become clear that the Court has no occasion to deal with the matter of deportation at all, it appears to be very unsatisfactory to make a recommendation for deportation which has to be formally transmitted to the Secretary of State. In the circumstances

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which are now known to us, we think that, following the language of art. 12 (7) of the Aliens Order, 1920, we ought to certify to the Secretary of State that we do not concur in the recommendation for deportation for the reasons which I have indicated. We express no opinion on the question whether, if these appellants could properly have been deported to some country, either case was one in which it would have been proper for a recommendation to be made. Equally we desire to indicate no opinion—for it is not our province to do so—on the question whether they are or are not proper subjects for an order of some kind under art. 11.

We are of opinion that the recommendation for a deportation order in the case of each of these appellants should be quashed.

Recommendations for deportation quashed.

[Counsel for Goldfarb applied that the sentence of imprisonment might be allowed to date from conviction, but the Court ordered that the sentences in each case should date from February 3, the date on which leave to appeal against the recommendation for deportation was given.]

Solicitors—W. T. Donovan, for appellant Goldfarb; Solicitor for Metropolitan Police, for the Crown.

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JOHN HENRY CHARLES ERNEST HOWESON.
LOUIS HARDY.

1936.
24 *February.*

Bail—Exceptional Circumstances—Certificate from Trial Judge.

Applications for bail refused after grant of a certificate for appeal from the trial Judge, the Court holding that there were no exceptional circumstances sufficient to justify the granting of bail.

Applications for bail.

The applicants were convicted at the Central Criminal Court on February 21, 1936, of aiding and abetting the director of a company in the publication of a false prospectus, contrary to section 84 of the Larceny Act, 1861, and were sentenced by Atkinson, J., Howeson to twelve months' imprisonment and Hardy to nine months' imprisonment, in each case in the second division.

Sir William Jowitt, K.C. (*G. D. Roberts* with him), for the applicant Howeson:

It is realised that exceptional circumstances must be shown before the Court will grant bail, but the present case went further than any previous charge under section 84 of the Larceny Act, 1861, and there is a very substantial point of law to be argued, as is evident from the fact that the Judge granted a certificate for appeal on the conclusion of the case. Further, the applicant is a man of many business activities and has many affairs which require to be wound up, and, the case being one of great complication, it would be useful if he could have free access to his legal advisers in the preparation of his appeal. At the police court and

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throughout the trial he was admitted to bail in his own recognisances. The Director of Public Prosecutions does not support or oppose this application, but leaves the matter entirely to the Court.

Walter Frampton, for the applicant Hardy, adopted the above argument.

TALBOT, J.: The Court sees in this case none of those exceptional circumstances which alone justify the granting of bail by this Court, and the applications must be refused. There is every reason to anticipate that the hearing of the appeals will not be postponed for long.

Applications refused.

Solicitors—Clifford-Turner & Co., for applicant Howeson; Lloyd and Armstrong, for applicant Hardy.

BEFORE

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HENRY WILLIAM WICKS.

Defamatory Libel—Tendency to Breach of the Peace—What Prosecution must prove—Knowledge of Falsity—Discharge of Onus of Proof—Libel Act, 1843 (6 & 7 *Vict.*, *c.* 96), *ss.* 4, 5.

A prosecution for defamatory libel ought not to be instituted where the libel complained of is of so trivial a character as to be unlikely either to disturb the peace of the community or seriously to affect the reputation of the person defamed. The prosecution, however, on a charge of criminal defamatory libel are not bound to prove that the

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libel would have been unusually likely to provoke the wrath of the person defamed or that such person was unusually likely to resent an imputation on his character.

Dictum of Mansfield, C.J., in THORLEY *v.* LORD KERRY (1812) 4 Taunt. 355, at p. 364, approved.

Observations on the mode of proving knowledge on the part of the defendant of the falsity of a defamatory libel.

Appeal against conviction, and application for leave to appeal against sentence.

The appellant was convicted at the Central Criminal Court on January 10, 1936, of publishing a defamatory libel knowing it to be false, and of publishing the same libel, and was sentenced by the Recorder to twelve months' imprisonment.

The libel was contained in a letter written by the appellant to one Chapman who, at the time when it was written, had been arrested and charged with criminal offences on the prosecution of the Sun Life Assurance Co. of Canada, to which Mr. Gurney acted as solicitor. In the letter the appellant, who claimed to have "a fairly intimate knowledge" of Mr. Gurney, made a number of imputations on his character. There was no plea of justification at the trial and the Recorder ruled that the occasion on which the libel was published was not privileged.

W. A. L. Raeburn (*Glanville Brown* with him), for the appellant:

It is of the essence of a criminal defamatory libel that there should be a tendency to cause a breach of the peace, and the jury were misdirected in that they were never told that a likelihood of a breach of the peace was essential. [He referred to Hawkins' Pleas of the Crown, 8th ed., Bk. I, ch. 28, p. 543; LABOUCHÈRE (1884), 12 Q. B. D. 320, at p. 322; WOOD *v.* COX (1888), 4 T. L. R. 652; Fraser on Libel and Slander, 6th ed., p. 324; Archbold's Criminal Pleading, etc., 29th ed., p. 1266.] Further, the occasion

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on which the appellant wrote the letter was privileged. The appellant honestly believed that Chapman was being prosecuted by Mr. Gurney, and at the stage when the letter was written Chapman was contemplating defending himself. It was of vital importance to Chapman that he should be provided with material which would go to the credit of the prosecutor. The letter, therefore, was written with regard to a matter in which the appellant and Chapman had a common interest. Again, on the charge under section 4 the jury were misdirected as to the burden of proof of knowledge of falsity, and there were no sufficient materials from which the jury could infer that the appellant knew the libel to be false. The sentence was, in all the circumstances of the case, too severe.

Sir Patrick Hastings, K. C. (*G. B. McClure* with him), for the Crown:

The law as to criminal libel is clearly stated in Russell on Crimes, 8th ed., Vol. 1, p. 983. Every defamatory libel may at the will of the person defamed be made the subject of either criminal or civil proceedings. If a defamatory libel is published, the law presupposes a tendency to excite the wrath of the person defamed and to create a breach of the peace. Even trivial libels are recognised by law as being a proper subject for criminal proceedings, with this limitation, that it is within the power of the examining justices to suggest that the case may be dealt with summarily as being trivial. There is no principle of law that likelihood to cause a breach of the peace should be alleged or proved. [He referred to HOLBROOK (1878), 4 Q. B. D. 42, at p. 46; LORD MAYOR OF LONDON (1886), 16 Q. B. D. 772, at p. 777; MUNSLOW, [1895] 1 Q. B. 761; BOALER (1888), 21 Q. B. D. 284, at p. 286; and Archbold's Criminal Pleading, 29th ed., pp. 1261-4.] The occasion on which the letter was written was not privileged. [He was stopped on this point.] Knowledge of the facts stated in the libel at the time when it was written is sufficient *prima facie* evidence of knowledge

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of falsity to support a charge under section 4, and here the appellant on his own admission had a "fairly intimate knowledge" of Mr. Gurney.

Glanville Brown replied.

Cur. adv. vult.

February 17. The following judgment of the Court was read by

DU PARCQ, J.: The appellant was convicted before the Recorder of London at the Central Criminal Court on January 10, 1936, upon an indictment which charged him with publishing a defamatory libel concerning Francis James Ward Gurney, knowing it to be false. A second count charged him with publishing the libel, with no averment that the appellant knew the libel to be false. The offences charged are those for which punishment is prescribed by sections 4 and 5 respectively of the Libel Act, 1843. The jury convicted the appellant on both counts, and he was sentenced by the learned Recorder to twelve months' imprisonment.

The libel was contained in a letter addressed by the appellant to a man named Chapman, who, at the date when it was written, had been arrested and charged with forgery and other criminal offences at the instance of the Sun Life Assurance Company of Canada. Mr. Gurney is a solicitor who acts for that company, and he gave evidence to the effect that, in the course of his duties, he had come into contact with the appellant during the last few years by reason of the fact that there had been litigation between the appellant and the company and some of its servants. That litigation, he said, terminated unsuccessfully for the appellant in every case. Nobody has suggested that the letter written to Chapman was not defamatory of Mr. Gurney. In it the appellant claimed to have "a fairly intimate knowledge" of that gentleman, whom he described as "this man Gurney," and said that according to his (the

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appellant's) experience, he was a man of "depraved moral character"—"even more so" than another man whom the appellant described as Mr. Gurney's "criminal associate." The appellant made more definite allegations against Mr. Gurney, which it is unnecessary to repeat. There was no plea of justification. These allegations must, therefore, be taken to be false, as no doubt they are. The learned Recorder rejected a submission made on behalf of the appellant, that there was no case to go to the jury because there was no evidence that the libel was likely to result in a breach of the peace, and directed the jury in these words: "A defamatory libel consists in the writing and publishing of defamatory words of any living person, words calculated or intended to provoke him to wrath or expose him to public hatred, contempt, or public ridicule, or damage his reputation . . . words written of a man which are likely to provoke him to commit a breach of the peace or, if seen by others, to hold him up to hatred, ridicule or contempt, or to damage his reputation."

In our judgment, the view taken by the learned Recorder on this point was right. It is true that a criminal prosecution for libel ought not to be instituted, and, if instituted, will probably be regarded with disfavour by Judge and jury, when the libel complained of is of so trivial a character as to be unlikely either to disturb the peace of the community or seriously to affect the reputation of the person defamed. We were referred to well-known passages in Hawkins' Pleas of the Crown and in the judgment in LABOUCHÈRE (1884), 12 Q. B. D. 320, which emphasise this truth, and it may well be that cases will sometimes occur in which juries may properly refuse to convict a man accused of criminal libel where the offence is trivial. It is also true that, as Lush, J., said in HOLBROOK (1878), 4 Q. B. D. 42, at page 46, libel is ranked among criminal offences "because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace."

There is, however, in our judgment, no ground for the suggestion made at the Bar that it is incumbent upon the prosecution to prove that the libel in question would have been unusually likely to provoke the wrath of the person defamed, or that the person defamed was unusually likely to resent an imputation upon his character.

We find no support for this theory in any judgment. On the contrary, the law remains what it was stated to be by Mansfield, C.J., in THORLEY *v.* LORD KERRY (1812), 4 Taunt. 355, at page 364, when he said: "There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt and ridicule; for all words of that description an indictment lies." It is of interest to observe that the question in that case was whether an action for damages could be brought in respect of words for which it was not doubted that an indictment would lie. Indeed, it was recognised at the end of the eighteenth century that libel was an exception to the general rule that *mens rea* was necessary to constitute a criminal offence (WALTER (1799), 3 Esp. 21). It cannot be suggested that the libel in the present case was one which any jury would have been justified in regarding as trivial, and there is, in our judgment, no substance in the first ground of appeal.

It was further contended that the letter was published on an occasion which was either absolutely privileged, or the subject of qualified privilege. The learned Recorder ruled that the occasion was not privileged absolutely or at all, and we agree with him. The defamatory letter was written to a man in whose affairs the appellant had no interest, except that they had both come into conflict with the Sun Life Assurance Company of Canada. This slender link of common interest could not, in any sense, authorise the pub-

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lication of false and defamatory statements about a third person, whose character was irrelevant to any question which was the legitimate concern of Chapman. The submission that absolute privilege attached to the letter because it is to be regarded as the equivalent of a witness's proof, or of a confidential communication to a solicitor in relation to legal proceedings (see WATSON *v.* M'EWAN, [1905] A. C. 480), seems to us to have no relation to the facts.

Finally, it was argued that the conviction upon the first count of the indictment could not stand because there was no evidence before the jury that the appellant knew the libel to be false. There is no doubt that, under such a count, it it is for the prosecution to satisfy the jury that the defendant had such knowledge, and that the burden of proving that he had not such knowledge never lies upon the defendant. In the present case, we see no reason for holding that the prosecution did not fully discharge the burden which rested upon them. The falsity of the libel is to be presumed, and, in the absence of a plea of justification, could not be questioned. The best and often the only way of proving that a statement was known to be false by the person who made it is to prove that he had the means of such knowledge. A jury is then entitled to draw what may be, in some circumstances, the irresistible inference that he had knowledge in fact. In the present case the jury may well have thought in the absence of any evidence to the contrary (and the appellant gave none), that a man who had had a fairly intimate knowledge of Mr. Gurney for some years, would know very well whether statements about Mr. Gurney's character were true or not, and they had the appellant's own word for it that he had such an acquaintance with Mr. Gurney. In his summing-up to the jury the learned Recorder used these words: "Did the defendant know those words to be false? Members of the jury, he has not attempted to prove them. It stands out before you quite clearly. In these circumstances, have you any difficulty in

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your minds about arriving at the conclusion that he knew them to be false?" The letter had, of course, been read and commented upon to the jury, and in those words the learned Recorder was putting to them, in a shorter form, the same considerations which we have set out at length. We see no reason to regard this as a misdirection.

It is only necessary to add that, having in mind the nature of the libel and all the circumstances of the case, we see no reason to question the propriety of the sentence.

The appeal is dismissed, and the conviction and sentence must stand.

Appeal dismissed.

The sentence was ordered to date from February 11, the last day of the hearing.

Solicitors—Gower, Pollard, Thorowgood and Tabor, for appellant; Freshfields, Leese and Munns, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MACNAGHTEN AND MR. JUSTICE DU PARCQ.

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JOHN HENRY GARABED BISHIRGIAN.
CHARLES ERNEST HOWESON. (*No.* 2)
LOUIS HARDY. (*No.* 2)

Prospectus—Falsity—Liability of Director—Omission of Material Facts—Future Commitments—Attempt to Corner Pepper Market not Disclosed—Larceny Act, 1861, (24 & 25 *Vict.*, *c.* 96) *s.* 84 (*a*).

Principles laid down in KYLSANT (23 Cr. App. R. 83, [1932] 1 K. B. 442) and earlier cases as to a prospectus being rendered false by omission applied to a case where a prospectus purported to invite investment in an old-established metal dealers' and brokers' business which, with a view to consolidating and enlarging its business and obtaining adequate capital, desired to acquire two other businesses carrying on ordinary trade in metals and commodities, but omitted to state the fact that money was really required to finance a gambling scheme for cornering the pepper market.

Appeals against conviction (on certificate).

The appellant Bishirgian was convicted at the Central Criminal Court on February 21, 1936, of knowingly making a false statement in a prospectus with intent to induce persons to become shareholders, contrary to section 84 of the Larceny Act, 1861. The appellants Howeson and Hardy

(*a*) By the Larceny Act, 1861, s. 84, "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to . . . induce any person to become a shareholder . . . therein . . . shall be guilty of a misdemeanour . . ."

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were convicted of aiding and abetting Bishirgian to commit that offence. All three appellants were also convicted on a second count which charged them with conspiracy to contravene the above section. They were sentenced by Atkinson, J., as follows: Bishirgian and Howeson each to twelve months' imprisonment, and Hardy to nine months' imprisonment, in each case in the second division.

The particulars of offence relating to the first count were as follows: Garabed Bishirgian, on September 3, 1934, being a director of a certain public company, to wit, James & Shakspeare, Ltd., made, circulated or published, or concurred in making, circulating or publishing, a certain written statement, to wit, a prospectus, which he knew to be false in a material particular with intent to induce persons to become shareholders in the said company. The particulars of offence relating to the second count were as follows: Garabed Bishirgian, John Henry Charles Ernest Howeson, and Louis Hardy, between December 31, 1933, and September 7, 1934, conspired together, and with other persons whose names are unknown, that the said Garabed Bishirgian, being a director of a public company, to wit, James & Shakspeare, Ltd., should make, circulate or publish, or concur in making, circulating or publishing a certain written statement, to wit, a prospectus, which he knew to be false in a material particular with intent to induce persons to become shareholders in the said company.

At the request of the defence for further particulars of the indictment two sets of particulars were supplied. They were in the following terms: (1) The prospectus states that James & Shakspeare, Ltd., had an option to purchase 101,000 ordinary shares of £1 each of Williams, Henry & Co., Ltd., and had a right to subscribe, after exercising that option, for 49,000 unissued shares of the same company at 25s. each. It states that it was the intention of the directors, immediately after the allotment of the shares they were offering to the public, to exercise that option and to acquire

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the unissued shares for a total sum of £162,250. But the prospectus, while purporting to set out the nature of the business and the assets and liabilities of Williams, Henry & Co., Ltd., omitted to state that Williams, Henry & Co., Ltd., had forward commitments at the date of the prospectus amounting in shellac to £399,079, and in pepper to £967,046, a liability, which, in the event of Williams, Henry & Co., Ltd., failing to meet its obligations, would make the shares which James & Shakspeare, Ltd., were acquiring valueless. There was, in fact, no specific mention in the prospectus of either shellac or pepper. The prospectus also states that it was proposed to acquire the valuable goodwill and organisation of the metal and produce departments of G. Bishirgian & Co. But it omitted to state that G. Bishirgian & Co. had acted as brokers in Williams, Henry & Co., Ltd.'s, purchases of shellac and pepper and that James & Shakspeare, Ltd., by acquiring that part of its business would become brokers for Williams, Henry & Co., Ltd., in any future purchases it might be necessary, in view of their heavy existing commitments, for them to make in shellac and pepper in order to keep up the prices on the market, and that, in default of their principals, James & Shakspeare, Ltd., would be liable for such further commitments as brokers. (2) A further document headed "Particulars showing how the omissions in the prospectus made it false in a material particular" stated: The prospectus is alleged to be false as a whole. The prospectus gave the impression to any member of the public reading it that he was being invited to invest in an old-established metal dealers' and brokers' business, which, with a view to consolidating and enlarging its business and obtaining adequate capital, desired to acquire two other businesses carrying on ordinary business in metals and commodities. The further facts of the case are stated fully in the judgment.

Upon the conviction of the appellants, Atkinson, J., gave, in each case, a certificate under section 3 of the

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Criminal Appeal Act, 1907, that the case was one fit for appeal on the question whether the prospectus was false within the meaning of section 84 of the Larceny Act, 1861.

Sir Patrick Hastings, K.C. (*C. L. Henderson* and *A. Marlowe* with him), for the appellant Bishirgian:

The facts of the present case did not come within the decision in KYLSANT (*supra*). In that case the prospectus contained positive statements of fact which could definitely be said to be false. A series of figures were included and were represented as showing annual profits, when in reality they related to a reserve account. There cannot be a criminal offence where the obligation imposed is so vague that no one can comply with it, and in the present case nobody has been able to formulate the matters which ought to have been included in the prospectus and which are said to have been wrongly omitted. The case for the prosecution appears to have shifted its ground. At the outset it was contended that the prospectus, in order to be true, ought to have stated that the business referred to was not a trading, but a speculative business. That contention subsequently disappeared, and the Judge ruled that the prospectus must be read as referring to a business which was in nature speculative, but that it might be interpreted as stating that there were no gambling commitments. The Judge sought to draw a distinction between speculative commitments and gambling commitments, but that distinction should not have been drawn. The omission to state how open and how speculative the commitments were could not render what was stated false.

[THE LORD CHIEF JUSTICE: Cannot the prosecution say on a charge under section 84 of the Larceny Act, 1861, that the total effect of the document is, and is intended to be, false?]

In a proper case proceedings may be taken on the ground that the whole of a prospectus is untrue, but the present

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argument is applicable to a case involving a peculiar nature of trading such as was the subject of the present case.

[He contended further that the summing-up contained various misdirections, and complained that the Judge had treated all three defendants as being on the same footing with regard to the second count, whereas only one or two of the defendants might have been concerned in the conspiracy, if any existed.]

Sir William Jowitt, K.C. (*G. D. Roberts* with him), for the appellant Howeson:

KYLSANT (*supra*) decided that, in order to constitute an offence under section 84 of the Larceny Act, 1861, there must be something more than mere omission. The matter can be illustrated by supposing an imaginary sheet of paper to contain on its left-hand side all that the document in question states, not only *expressis verbis*, but also by necessary implication, and on its right-hand side the facts as known. The offence is committed only if the right-hand side of the sheet completely contradicts and falsifies the left-hand side.

[He also complained of a number of matters with regard to the summing-up, especially that the Judge had then for the first time introduced the suggestion that the attempt to corner the pepper market might have begun very much earlier than July, 1934.]

W. T. Monckton, K.C. (*Walter Frampton* with him), for the appellant Hardy:

KYLSANT (*supra*) involved no departure from the law existing at that date. In that case a number of earlier authorities relating to common law deceit were considered, and in those cases a vital distinction was drawn between concealment *per se* and the kind of misrepresentation which arose from something being stated and something else being omitted on the same subject-matter so as to render what had been stated false. It is never right to submit a prospectus to the test whether it presents a complete picture. The

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prospectus in the present case, properly regarded, is entirely silent on the question of future commitments.

[He referred to ARKWRIGHT *v.* NEWBOLD (1881), 17 Ch. D. 301; MACKEOWN *v.* BOUDARD-PEVERIL GEAR CO. (1896), 65 L. J. Ch., 446, 735; COMPONENTS TUBE CO. *v.* NAYLOR (1900), 2 I. R. 1, at p. 59; CHRISTINEVILLE RUBBER ESTATES, *In re* (1911), 81 L. J. Ch. 63.]

The Attorney-General (*Sir Thomas Inskip, K.C.*) (*Eustace Fulton* and *L. A. Byrne* with him), for the Crown:

The case for the Crown was that the transactions for which the public were being invited to part with their money were not dealings by way of trade, but undertakings in the nature of a gamble, the intention being to make a profit by obtaining enough of the commodity to raise the price against the purchasing public. It was never the case for the Crown that the gamble began only in July, 1934.

The summing-up was entirely adequate, and was very favourable to the defendants at many points. [The Court intimated that they did not require argument on behalf of the Crown with regard to the law.]

Sir William Jowitt, K.C., C. L. Henderson and *W. T. Monckton, K.C.*, replied.

THE LORD CHIEF JUSTICE [after stating the terms of the indictment and the particulars thereunder]: Our attention has been directed in the course of the arguments on behalf of the appellants to many cases, including and antecedent to the recent case of KYLSANT (23 Cr. App. R. 83; [1932] 1 K. B. 442). It has been said, and said correctly, in the course of the argument, that the decision of this Court in that case lays down no new law, but merely applies to the facts of that particular case the law which for a long time was well-settled. The judgment of the Court begins by referring to various authorities which, in the view of the Court, supported the view of the law contained in the

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summing-up of Wright, J. The first of the authorities cited was GLUCKSTEIN *v.* BARNES in the year 1900. In that case Lord Macnaghten said this ([1900] A. C. 240, at p. 250): "It is a trite observation that any document as against its author must be read in the sense which it was intended to convey. And everybody knows that sometimes half a truth is no better than a downright falsehood." Passages from judgments in PEEK *v.* GURNEY (1873), L. R. 6 H. L. 377, at pp. 386 and 402, and AARON'S REEFS LTD., [1896] A. C. 273, at pp. 281-284, were also read, and there have been cited to us other and earlier judgments, all to the same effect. There can be no doubt that the law which is applicable to such a case is perfectly clear. The expression of the law varies, but the meaning remains identical. If a statement is to be impugned under section 84 of the Larceny Act, 1861, it may be because there has been such a partial and fragmentary statement of fact that the withholding of that which is not stated makes that which is stated false; or, to use other words, there must be such a non-disclosure as to render the document misleading. Or again, in the words of Eve, J., in CHRISTINEVILLE RUBBER ESTATES, *In re* (1911) 81 L. J. Ch. 63, at p. 66: "It must, I think, be shown that the non-disclosure is the non-disclosure of something the disclosure of which would falsify some statement in the prospectus."

Now the argument here on behalf of the Crown is not merely that that condition is satisfied, but that it is satisfied *a fortiori*, and that the concealment of that which has been concealed renders the whole prospectus a lie. The case for the Crown here, as I follow it, is not that in this or that particular the prospectus, which was put forward for the purpose of dragging from the public large sums of money, was in some accidental or incidental way false; the case is that the very essence and intention of the document was to mislead, and that it was a cheat from beginning to end. The way in which the learned Judge, in his extremely careful

and complete summing-up, expressed the matter was plain enough for any jury to follow. He referred to the matter again and again; he put it very concisely at an early stage of his summing-up, when he said: "This document cannot be a false document merely because something is omitted; it has to go beyond that. The omission has to make that which is stated affirmatively untrue, untrue in the sense that it creates clearly and intentionally an impression in the public, a belief in the mind of the public, which is wrong. If it does not, there is an end of the case."

Elaborating that statement with regard to the second ingredient in the charge, he immediately afterwards said this: "Did the defendants know of its falsity? Here again you have to be very, very careful. You have got to be precise. It is not enough to say they knew of the omission, that is not enough. They have got to know and appreciate its falsity. In other words, if you were trying to describe the state of mind, it must be a state of mind which amounts to this: 'Yes, I know that I have omitted something that ought to be there. I appreciate that this is making my prospectus affirmatively false. I know and appreciate that that prospectus will create a certain impression, an impression which is not true.' It is not enough merely to say: 'We are satisfied they knew of the omission.' It is not enough to say: 'We are satisfied they knew that it was an important omission.' You must go further and say: 'We are satisfied that they knew that this omission made that document a false document,' in the way that I have described to you." In the opinion of the Court, that was a correct and fair direction upon the question of law.

Now here the contention which is made by these appellants is that the prospectus, which offered preference shares and ordinary shares in James & Shakspeare, Ltd., was not false in any material particular within the meaning of the statute. The case for the Crown was that the evidence proved conclusively that the prospectus was false as a whole

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in that it gave an entirely false description of the business in which the public were being invited by the prospectus to invest their money. The public were invited by this prospectus to subscribe £300,000 for preference shares and £112,500 for ordinary shares of James & Shakspeare, Ltd., a company which was carrying on, as was said, business in London as metal dealers and brokers, a business founded in 1844 and carried on uninterruptedly from that time. The prospectus stated: "The carrying of stocks on the London market for account of clients is essential to the successful development of the company's business, which has been retarded in the past by the inadequacy of its capital resources." Out of the total amount for which subscription was being asked, namely £412,500, a sum of £162,000 was to be used in acquiring a majority interest in a company called Williams, Henry & Co., Ltd., a company, as it was said, with similar interests, having important agencies and connections in the United States of America, India, and the Colonies. That was the description, and the only description, given in the prospectus of the business of Williams, Henry & Co., Ltd. The balance of the £412,500, after providing for the expenses of the issue—a balance estimated at approximately £225,000—was to supply the additional capital resources, the inadequacy of which had retarded the successful development of the company's ordinary business. The words of the prospectus are: "The substantial amount of additional working capital which will now become available for that purpose, namely the carrying of stocks on the London market for account of clients, should assist materially in exceeding both the volume and the scope of the company's activities."

The contention on the part of the prosecution was that the prospectus by that which it did state with regard to the businesses of James & Shakspeare, Ltd., and of Williams, Henry & Co., Ltd., and especially by contrast with what it omitted to state, gave, and was intended to give, an utterly

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false description of the business into which at that time the public were really, though they did not know it, being invited to put their money.

With regard to the facts, subject to some comparatively minor matters, there is really no dispute. The case which was made was that the persons behind this prospectus were really at this time engaged, not in ordinary business, but in a gamble to make a corner in pepper, or to control the price, or to command the market. That gamble had been conducted by Williams, Henry & Co., Ltd., a private company belonging wholly in different proportions to Bishirgian and Howeson. They were advised by a memorandum from a Mr. Walker, which very usefully was produced at the trial, that, inasmuch as a quantity of 12,000 tons of pepper was the average annual amount of consumption of white pepper, an interest of say 2,000 to 3,000 tons would provide a decisive influence on the trend of prices. And by June 30, 1934, Williams, Henry & Co., Ltd., had bought 2,460 tons of pepper, Mr. Bishirgian acting as broker for that company, and there followed on July 24 a decision to buy pepper up to the quantity of 6,000 tons.

Much of the argument in this Court has exhibited once more the fallacy which may arise upon the mere misuse of terms. The particular term which lays the foundation for the main fallacy, on which the appellants repose, is the term "future commitments." Anybody who is at all acquainted with business, and anyone who reads about companies with intelligence, must be taken to know that some future commitments there must be. So the learned Judge rules, and so indeed it is obvious. And because they are future commitments, although, no doubt, they ought to be entered in a properly kept minute-book, they might well fail to find a place in accounts duly audited, for the reason that future commitments do not become material for the work of the auditor, inasmuch as the time has not yet arrived when they have crystallised either into a profit earned or into a loss

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incurred. Future commitments of a normal business are one thing; the future commitments of a colossal gamble are different, not merely in degree, but in kind. Sir Patrick Hastings, in the course of his argument, developed the proposition that, inasmuch as it is apparent, not indeed from express words, but from reasonable inference, that there must be some future commitments, it is really not material for the purposes of the present case to examine the dimensions of these commitments; given the fact, the quantum, it is said, does not matter. There, it seems to me, lurks the fallacy. The future commitments of normal business are one thing; the airy speculations of a colossal gamble are quite a different thing. It is not a difference of degree, it is a difference of kind. As the learned Judge explained at some pains in the course of his summing-up, using an apt illustration to make the point clear, there is not merely some difference, but all the difference, between the future commitments of normal trading and the future commitments of an attempt to corner. The financing, as it is called, is different; the risks are different. To advertise a business as a normal business seeking development, when money is really being asked to feed and supply an ambitious gamble, is merely deceit. The argument is not that in this or that particular this prospectus was untrue; the argument is that its whole purpose and effect were to deceive.

It is said that no suitable words could have been included in this prospectus to repair the omission. It is not quite clear to us what that proposition means. If suitable and true words had been there, it may well have been that the prospectus would not have been of much use as a prospectus. Suppose, for example, there had been a note on the first page or the last page in red ink: "N.B.—You are apparently being invited to subscribe for shares in a well-known, old-established, ordinary business, carrying on its operations on approved lines. You are really being invited to trust your money to a gambling speculation to make a corner in

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pepper." It would have been true, but the utility of the prospectus would have been extremely small.

That was the case, and the main facts in the case, protracted as it was, are not in dispute. There may be some dispute about date, some dispute as to the precise moment of time when the gamble began, but it was antecedent to this prospectus. The purpose for which this money was wanted, and to which it was applied, was the bolstering up of a very ambitious scheme, which failed, to control the pepper supply of the world. In order to ascertain the question whether this document was false in a material particular or in all material particulars, one may ask oneself this question: If the facts had been revealed or even clearly indicated, would any man of sense have put his money into the scheme? That question is sought to be answered on the part of the appellants by the statement: "The appellants themselves put money into it and themselves undertook large personal risks; they believed they were investing in a good thing." No doubt there was a time when they entertained the most sanguine expectations of this enormous operation upon which by increasing degrees they had entered, but that does not alter the nature of the operation. The public were not told what the good thing was; they were told that the good thing was quite a different good thing, and really, after hearing all the arguments, when one analyses the answer which is offered on the part of the appellants, it comes to no more than the excuse of the office boy who takes half-a-crown out of the till, and adds to it sixpence of his own, because he has got a good thing for the Grand National. Morally and legally the transactions are substantially on the same footing—the dimensions only differ.

On behalf of the appellants it is contended that the judgment in KYLSANT (*supra*) does not apply. Of course the facts of this case are not identical with the facts in the case of KYLSANT (*supra*). The question is not whether the facts

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are identical; the question is whether the well-settled principles exhibited, but not for the first time laid down, in that case apply. In our opinion they clearly apply here *a fortiori*.

The rest of the argument for the appellants is that in various respects the learned Judge misdirected the jury. I have read this summing-up more than once. I am not going to presume to apply complimentary epithets to it; it examines the facts in this case with completeness and care; it states the law with precision and accuracy. It not only lays it down that if upon the whole sum of the matter a reasonable doubt is left in the minds of the jury upon the question whether the prosecution has established its case, that doubt must be resolved in favour of the prisoners, but it goes further. It lays it down apparently again and again that upon every question incidentally arising in the course of the case any doubt must be resolved on the side of the prisoners and any explanation offered by a prisoner must be accepted. The appellants cannot complain of a direction like that. It is quite true that upon the particular topic of conspiracy, if the words used by the learned Judge are to be interpreted literally, he appears to slip into the error of saying that, in order to complete the crime of conspiracy, the criminal act intended to be done must in fact be done. Probably the phrasing of that particular part of the summing-up is due to the circumstance that the conspiracy here charged was a conspiracy that Bishirgian "should make, circulate, etc., a written statement, which he knew to be false." And it may well be that what was in the learned Judge's mind was that, whether one looked at count 1 or count 2, the essential ingredient was knowledge on the part of Bishirgian that the document was false. But that particular passage relating to conspiracy, which, in terms at any rate, laid it down that, unless Bishirgian did indeed commit the offence of making or circulating a false statement, neither of the other two could be guilty of conspiring

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with him or with persons unknown that he should make such a false statement, was unduly beneficial to the appellants, unless indeed one is to draw the inference that on that ground the jury were disposed to convict the other two appellants and therefore included Bishirgian also. The Court would be loth to draw any such inference, and the sting of that argument entirely goes when one remembers that under count 1 also the jury have found a verdict of "Guilty." It was fundamental upon that count that Bishirgian, being a director, should have been found to make a statement which was false.

There have been individual complaints of this or that passage in the summing-up, according to the well-known and perfectly legitimate method of putting every sentence of a summing-up under a microscope to see if there is something with which fault may be found. But we are satisfied that this summing-up, taken as a whole, one part of it being read with another part of it, was eminently fair, and that there is no ground upon which it can be alleged that there was either affirmative misdirection or that kind of misdirection which consists of omission. It is quite true that in one passage the learned Judge dealt with the date at which the gamble, the attempt to corner, must be taken to have started, assuming that he himself was the author of a particular suggestion. With all due respect to the learned Judge, it is by no means clear that that is correct. On the contrary, there are certain passages in the questions asked by the Attorney-General which would be meaningless if it were indeed true that it was left to the summing-up to suggest a particular date for the inception of the gamble. We have listened with attention to all the individual complaints which are offered. In our opinion there is no substance in them and there is nothing which affects the validity of this verdict. The case was amply proved; the law was clearly and accurately stated, and these appeals must be dismissed.

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According to the usual practice, leave to appeal having been given, the period during which the appellants have been treated as appellants will be a part of the terms they have to serve.

Appeals dismissed.

Solicitors: Barlow, Lyde and Gilbert, for appellant Bishirgian; Clifford-Turner & Co., for appellant Howeson; Lloyd and Armstrong, for appellant Hardy.

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Murder—Fresh Medical Evidence heard—Exceptional Circumstances—Conviction quashed.

Conviction of murder quashed after the Court had heard fresh medical evidence as to the cause of death, the Court emphasising the fact that such reception of fresh evidence was to be regarded as wholly exceptional.

Appeal against conviction.

The appellant was convicted at Sussex Assizes on March 11, 1936, of the murder of her infant child, and was sentenced by Finlay, J., to death.

The following statement of facts is, in substance, taken from the judgment:—

The appellant was a married woman of thirty-one years of age, and had four children, three of whom were older than the infant to whom the charge related. The appellant's

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husband was a traveller, and before December 23, 1935, the family had been living in Maidstone. The infant to whom the charge related was born on June 26, 1935. The appellant had a sister-in-law, Mrs. Gladman, who lived in Chichester, and she and her husband and the children were to go to stay with the sister-in-law on the day before Christmas Eve. There was evidence that neither the appellant's mother, nor the sister-in-law, knew that the last baby had been born. The appellant had not been in communication with her mother for some time. Also there was evidence that the appellant did not take the baby's perambulator with her to Chichester, and, moreover, that, while the appellant's sister-in-law had room for three children, she had not room for four. On December 8 the appellant had caused an advertisement to appear in a Kentish newspaper, and had also advertised elsewhere for someone prepared to adopt the baby.

On December 23 the appellant and her husband and children went to Chichester by train and reached the railway station there about 3 p.m. The husband and the three older children then went to the house of Mrs. Gladman, and the appellant carried the baby along the path of a canal bank, where she was seen by two different groups of witnesses. The first group saw her with the baby, and some of them saw her sitting on a seat apparently suckling the child. One of them was so much impressed by the strangeness of her sitting on the seat for so long a time on a bitterly cold day, that he watched her for an appreciable time. Somewhat later in the afternoon the appellant was seen by other witnesses along the canal, and then the baby was no longer with her. Two boys, who had a spaniel by the canal on that afternoon, saw an object in the water, and the dog retrieved it. It was thought at first that that object was a doll, but the boys discovered that it was the body of a child, and informed the police. The body was examined by a doctor, who formed the opinion that death had been due,

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not to drowning, but to shock. The appellant walked from the place by the canal, where she had been with the baby, to the house of her sister-in-law, a distance of some three miles, and arrived there at 5 p.m. She entered without greeting her sister-in-law, and then left the house in order to do some shopping with her husband, and came back about 8 p.m. The police came to the house, and when the appellant saw them she said, "Shall we go into the front room?" and there she made a statement to them, in the course of which she said:—

"On my way I went along the canal bank. I sat down on the seat, I became rather worried whether this person would take the child"—that is, a person expected or hoped to become an adopting parent—"and I became rather giddy and faint. When I was feeding baby I fainted right off. When I came to, I missed the child and I looked for it; I looked round for it and I never dreamed that I should find it in the water. It was such a shock for me, when I came to, to find my baby gone. I couldn't think what had happened to it. I suppose, whilst I was in the faint, it had rolled in the water. When I realised where it was, it so frightened me, that I was afraid to tell my husband."

The appellant gave evidence on her own behalf and admitted that neither Mrs. Gladman nor her mother knew that the infant to whom the charge related had been born. She said that she had not been in communication with her mother for the last two years, and that she was walking along the canal bank, because she thought she would go and see her mother, whom she had not seen for a long time. Her mother, she said, lived in that direction. She sat down on the seat by the canal and there fed the baby; she became giddy and faint, and, when she came to, missed her baby; she was lying near the water on the tow-path, and saw the baby in the water. She went on to say that she tried to reach the baby with a piece of wood, and then got frightened and went away.

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John Flowers, K.C. (*Geoffrey Lawrence* with him), for the appellant:

There was undoubtedly considerable evidence against the appellant, but there were also very salient points in her favour. No one actually saw what happened, and, apart from the medical evidence, the jury might well have been left in doubt. The summing-up is not open to any criticism. Leave is sought to call fresh medical evidence. The proposed witness was present at Assizes in his official capacity, but was not then an available witness for the defence.

THE LORD CHIEF JUSTICE: In the exceptional circumstances of this case, we are of opinion that we ought to hear this further evidence.

Evidence was then given by Dr. John Campbell McIntyre Mathieson, Governor and Medical Officer of Holloway Prison, to the effect that the post-mortem condition of the infant's body was compatible with death from shock due to water suddenly going up the nostrils, and that that could have happened if the infant had fallen from the appellant's arms and rolled down the bank into the canal.

St. John Hutchinson, K.C. (*James Burge* with him), for the Crown:

The Crown do not desire in any way to press this distressing case, but it is right to point out that, in addition to the medical evidence, there was a considerable body of other evidence against the appellant, particularly with regard to her conduct after she knew that the infant was in the canal.

THE LORD CHIEF JUSTICE [after stating the facts of the case substantially as set out above]: After an eminently fair trial, and after an admirable summing-up by the Judge upon which not a word of criticism is suggested, the jury found the appellant guilty of murder, and added a very strong recommendation to mercy, with regard to which the

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Judge said that it would be forwarded to the Secretary of State, and would, he knew, receive the most anxious consideration.

Now great stress was most naturally and properly laid by the Judge upon the evidence of the doctor, who was called on behalf of the prosecution. He said that that evidence was evidence which was of great importance in the case. He analysed it with care, and he returned to it again and again. The point of that evidence was that death by shock, as distinguished from death by drowning, pointed to a sudden and complete immersion of the infant's body in the cold water of the canal. It is quite obvious that the attention, not only of the witness, but of counsel on both sides, and of the Judge and the jury, so far as that critical matter was concerned, was directed to the effect produced by immersion, which was rapid in point of time and complete in point of extent. [After referring to the evidence of the doctor, and certain questions put by a member of the jury, His Lordship continued.] It is apparent that the mind of, at any rate, one juror was clearly directed to the question whether the symptoms disclosed by the post-mortem examination, and regarded by the doctor called for the prosecution as pointing clearly to the throwing of the baby into the water, as distinguished from symptoms which might have been found if the baby had fallen from the arms of the mother straight into the water, might be attributable to the other antecedent. The answer was given that, although possible, it was very unlikely that the signs observed, as distinguished from signs of drowning, would be found if the baby had fallen straight from the mother's arms into the water, and that "very unlikely" was translated ultimately into the words, "so very unlikely as not to be worth considering". One cannot help observing, with regard to some of those questions, a combination of essentially different matters, which are so often wrapped up where a medical witness is being ques-

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tioned. The ultimate problem being to find out what has happened, questions are asked as to the probability of such-and-such an effect being found. That, of course, involves the further question as to the probability or improbability of the appropriate cause having been made manifest, and it is very important to distinguish between the question: Was the particular cause more likely to have occurred than some other cause?, and the essentially different question: If the cause had occurred, would the effect follow?

It is clear to anyone who considers the full note of this evidence that throughout the case the minds of all concerned were being directed to the problem: Could these signs of death by shock, in sharp distinction to the signs of death by drowning, have made their appearance if the child, not being thrown, had suddenly fallen into the water? In other words, everybody was considering the rapidity and the degree of the immersion. Now this Court has been asked to-day, in circumstances which are quite exceptional, perhaps unprecedented, and never likely to be repeated, to hear further medical evidence, and we have had the great advantage of hearing the evidence of the distinguished medical gentleman, who now has the responsible duty of being Governor of Holloway Prison, where he is also the experienced medical officer. It happens that he heard the evidence at the trial, not as a witness, nor as a potential witness, but because in his capacity of Governor of Holloway Prison he was present in the Court. He has been called to offer his evidence, and in the peculiar circumstances we have thought it our duty to hear that evidence. He has shown clearly, if his evidence is accepted, as it is, that shock and death from shock may well be due to the fact that water goes up the nostrils. In other words, the question is, as between shock and drowning, not what was the area of bare skin which suddenly came into contact with cold water, but were the circumstances such as to permit cold water suddenly to go into and up the nostrils? He described the

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pathological and physiological effect of the entry of cold water in that way; and if that view is right, it follows that the rapidity of the immersion and the completeness of the immersion become possibly minor considerations, and in tracing the possible cause of death the important question is: Was there such a sudden entry of cold water up the nostrils as might have such an effect upon the nervous organisation of the body as to cause the heart to be made void of blood and bring about death by shock? In his opinion, it is clearly possible. Of course, he does not express a view—it is not a medical question—whether the antecedents are likely to have taken place, but he has no doubt at all that, given the cause, the effect would follow.

We cannot help feeling that, if evidence of that nature, or directed to that point, had been in the hands of the defence at the Assizes, the course of this trial would of necessity have been different. The line of cross-examination would have been different; the addresses to the jury would have been different; and undoubtedly the summing-up of the Judge, both as to what it says and as to what it does not say, would have been different. It is quite true, as was said by Mr. St. John Hutchinson, who has performed a painful duty, as one would expect, with perfect propriety, that, apart from the moments immediately preceding the event which brought about the death of the child, there were circumstances tending to excite suspicion, to indicate motive, and to make it seem probable that the appellant was guilty of the crime which was charged. But on the matter, which was the very pith of the case at the end, how exactly did the child come into contact with water so as to die from shock, the crucially important view, which has been clearly laid before this Court by Dr. Mathieson, was entirely absent. It had occurred to nobody. It was suggested by nobody. It was not the subject of any observations.

The question for this Court to consider is whether,

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if that evidence had been given before the jury, it might have had the effect of raising in the minds of the jury a reasonable doubt. The function of the prosecution is, of course, to establish the case beyond a reasonable doubt. If it fails to fulfil that condition, the prisoner is entitled to be acquitted. The burden of proof is never upon the prisoner. Acquittal must follow if the evidence is such as to cause a reasonable doubt, because that is only another way of saying that the prosecution have failed to establish the case.

Looking at this evidence with care, and recognising the force of the rest of the evidence in this case, we are clearly of the opinion that, if this evidence had been offered in the Court below, there might have been upon the part of the jury a reasonable doubt as to the guilt of the appellant; or, to put it in another way, we cannot say that, if that evidence had been offered, the jury must inevitably have come to the same conclusion. In those circumstances the only conclusion which is possible for this Court is to say that the appeal must be allowed, and the conviction quashed.

It is right to add that, not by any means for the first time, it is satisfactory to find that distinguished counsel, upon whose time there are many claims, are ready and willing to offer their best efforts on behalf of a poor prisoner and not to be content with the conclusion of the case at Assizes, but to follow it up with the utmost care to the end.

Conviction quashed.

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ARTHUR GEE.
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Practice and Procedure—Depositions—Irregular Method of taking—No lawful Committal for Trial—Trial a Nullity—No Order in Nature of Venire de novo—Convictions quashed—Indictable Offences Act, 1848 (11 & 12 *Vict. c.* 42), *s.* 17—*Administration of Justice (Miscellaneous Provisions) Act*, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 2.

Section 17 of the Indictable Offences Act, 1848, requires magistrates, when any person shall appear before them charged with an indictable offence, to take the statements of witnesses on oath or affirmation and to "put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same . . ."

By the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2), ". . . no bill of indictment charging any person with an indictable offence shall be preferred unless either—(a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under section 9 of the Perjury Act, 1911."

Where, therefore, the witnesses in the police court had been examined from prepared typed statements analogous to proofs, copies of which were handed to the magistrates and their clerk, but not to the prisoners, and nothing was taken down in writing by the magistrates or their clerk, but each prepared statement was checked by the clerk and ultimately signed by the witness,

Held, the above irregularities in the taking of the depositions rendered the proceedings so defective that there had

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been no lawful committal for trial within the meaning of section 2 (2) of the Act of 1933, and consequently no bill of indictment could be preferred against the appellants. The trial was, therefore, a nullity.

Held, further, in view of the fact that the appellants had been for a considerable time in custody, the Court would not make an order in the nature of a *venire de novo*, but would quash the convictions.

It is important that magistrates when taking depositions should comply strictly with the provisions of section 17 of the Indictable Offences Act, 1848.

Appeals against conviction.

The appellants were convicted at Oldham Borough Quarter Sessions on March 13, 1936, of shopbreaking, and were each sentenced to seven months' imprisonment.

According to a practice which had prevailed for some time at Oldham Police Court, the Chief Constable examined the witnesses from prepared typed statements analogous to proofs, but it was not made clear exactly what form the examination took. A copy of each statement was handed to the magistrates and their clerk, but not to the prisoners. Nothing was taken down by the magistrates or their clerk in writing, but each statement was checked by the clerk and ultimately signed by the witness.

The appellants appeared before the Recorder for trial on January 7, 1936, and an objection was raised on their behalf that the depositions had been taken in an irregular manner and that the Recorder had no jurisdiction to try the indictment. The Recorder adjourned the case to the following sessions on March 13, 1936, and admitted the appellants to bail. At those sessions the objection was renewed, but the Recorder held that he was bound to try the indictment.

R. N. Bibby-Trevor, for the appellants:

The method adopted in the taking of the depositions was not in accordance with section 17 of the Indictable Offences

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Act, 1848 (*a*). There was, therefore, no proper committal for trial, and no indictment before the Recorder. [He was stopped.]

D. Hamwee, for the Crown:

It is extremely unfortunate that the provisions of section 17 of the Indictable Offences Act, 1848, were not complied with, but it would have been more appropriate to question the validity of the indictment by *certiorari*.

GODDARD, J.: The three appellants in the present case were convicted before the Recorder of Oldham of breaking and entering a shop with intent to commit a felony therein.

(*a*) By the Indictable Offences Act, 1848, s. 17: "In all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence . . . such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement . . . on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same . . ."

By the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (1): "Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of the next following sub-section have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly: . . . (2) . . . no bill of indictment charging any person with an indictable offence shall be preferred unless either—(a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under section 9 of the Perjury Act, 1911."

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There is a ground of appeal based on the facts, but in the opinion of the Court, if it had been necessary to consider that ground, very little could have been urged on behalf of the appellants on that head.

The serious ground of appeal is that the appellants were never lawfully before the Court of quarter sessions, because there had been no committal for trial within the meaning of section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and, therefore, there was no indictment before the Court. That question depends on whether the magistrates lawfully committed the appellants for trial. The facts relating to the hearing before the magistrates are the important matter in the case, and they are, in substance, beyond dispute.

It appears that for many years a practice has prevailed at the police court at Oldham under which, when an indictable offence is being investigated, the Chief Constable first interviews the witnesses, as he is entitled to do, and takes statements from them. Those statements are then typed out in narrative form, and when the prisoner is brought before the magistrates the typed statements are handed to the magistrates. It is not clear exactly what kind of examination takes place in the presence of the prisoner, but it is clear that the provisions of section 17 of the Indictable Offences Act, 1848, were not complied with. That Act was passed, among other reasons, to introduce uniformity into the practice of magistrates dealing with indictable offences preliminary to committal for trial. Before 1848 the practice of different magistrates varied and no uniform principles were applied to the taking of depositions, and it was not possible for a prisoner to obtain a copy of the depositions before trial. One of the objects of the Act of 1848 was to standardise the procedure, and it is of the utmost importance that magistrates should understand that there should be strict compliance with the provisions of the Act. [His Lordship read section 17 of the Act, and continued:]

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It is common ground that the proceedings before the magistrates in the present case were not in accordance with the above Act. What is the effect of that? [His Lordship read section 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and continued:] The question here is whether the persons charged have been legally committed for trial. "Committed for trial" is defined in section 27 of the Interpretation Act, 1889. "The expression 'committed for trial' used in relation to any person shall, unless the contrary intention appears, mean . . . committed to prison with the view of being tried before a judge and jury, . . . and shall include a person who is admitted to bail upon a recognisance to appear and take his trial before a judge and jury." The magistrates purported to commit the appellants for trial by remanding them in custody until trial. It appears to the Court that these proceedings were so defective that there was no lawful committal for trial, and consequently the provisions of section 2 (2) of the Act of 1933 were not complied with and no bill of indictment could be preferred against the appellants. The document purporting to be an indictment which was produced before the Recorder was not an indictment, and the appellants could not be tried on it.

The point was taken before the Recorder on January 7, and he expressed some doubt whether he was not bound to try the indictment placed before him, but he remanded the appellants on bail and gave them the opportunity of moving by *certiorari* to quash the indictment. They did not take that course, and at the next sessions the same objection was taken before the Recorder. He thought that he could not give effect to it and that he was bound to try the indictment. In the opinion of the Court that was wrong. Though the appellants might have moved by *certiorari* to quash the indictment, the fact that they did not do so did not make a bad indictment a good one. The Court is of opinion that the objection taken on behalf of the appellants was valid.

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The result is that there has been what is sometimes called a mis-trial, though it would be more accurate to say that there had been no trial at all. Under the decision in CRANE *v.* DIRECTOR OF PUBLIC PROSECUTIONS (15 Cr. App. R. 183; [1921] 2 A. C. 299) this Court has power to order that a proper trial should take place, and in that case the proceedings would recommence from the point where they broke down. This Court also has power in such circumstances, and has acted on it on several occasions in cases where it was held that the interests of justice so required, to quash the conviction and allow an appellant to be discharged. In all the circumstances of the present case the Court is of opinion that that is the proper order to make. The appellants have been in custody for about three months before trial; they were then held to bail for three months, and have been nearly two months more in custody since conviction. If the Court were to order that the proceedings should begin *de novo*, the appellants would have to go back before the magistrates and be committed again to quarter sessions, which may not be held for some time, and that would be, in the circumstances, oppressive.

For the above reasons the Court has come to the conclusion that the proper order to be made is that the convictions should be quashed and the appellants discharged.

The Court expresses the hope that magistrates in Oldham and in any other Court where a similar practice may have prevailed will in future comply strictly with the provisions of the Indictable Offences Act, 1848. Considering that since 1933 a committal by magistrates is substituted for a presentment by a grand jury, it is of the greatest importance that there should be no deviation from the requirements of the statute.

Convictions quashed.

BEFORE

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DAVID HENRY CAIN.

Procedure—Evidence-in-Chief by Prisoner—Undesirability of Undue Cross-Examination by Judge.

Observations on the undesirability of a prisoner when giving evidence-in-chief on his own behalf being unduly subjected to cross-examination by the Judge.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at the Central Criminal Court on March 5, 1936, of conspiracy to defraud and obtaining property by false pretences and was sentenced by the Common Serjeant to eighteen months' imprisonment.

It is unnecessary to refer to the facts of the case except in so far as they appear in the argument and judgment.

T. J. Kelly, for the applicant:

The trial was conducted in an irregular manner, in that a co-defendant of the applicant named Chatt, when giving his evidence-in-chief, was subjected to continuous and severe cross-examination by the Judge. [He relied also on certain other grounds of appeal.]

No counsel appeared for the Crown.

DU PARCQ, J. [after referring to the facts of the case]: When Chatt was in the witness-box giving evidence-in-chief he was subjected to what Mr. Kelly has called severe cross-

examination. The Judge began by doing something of which no one could complain. It was a long case, and he had taken a careful note, and it was quite right, so long as counsel for the defence had no objection, that the Judge should put to the defendant when giving evidence the various allegations of the witnesses for the prosecution, in order that he might deal with them. So long as they were put colourlessly, no one could object. Indeed counsel for the defence might have thought it assisted him in his task. There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable in this case that, beginning in the way which I have described, the Judge should proceed, without giving much opportunity to counsel for the defence to interpose, and long before the time had arrived for cross-examination, to cross-examine Chatt with some severity. The Court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner. It is obviously undesirable that the examination by his counsel of a witness who is himself accused should be constantly interrupted by cross-examination from the Bench. Cross-examination in cases of this kind is usually quite efficiently conducted by counsel for the Crown. At the same time, although it is quite right that this criticism should have been made in this case, we cannot find the slightest reason for thinking that the result would have been otherwise if this course had not been taken by the Common Serjeant.

It is right to say, looking at the summing-up as a whole, that it was perfectly fair, and it is right also to say that the Common Serjeant told the jury that they might disregard any view he might have appeared to have taken of the case because the facts were a matter for them. In these circum-

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4 *May.*

DAVID HENRY CAIN.

Hewart, L.C.J., du Parcq, J., Goddard, J.

stances it is impossible to say that there are grounds for interfering with the conviction and this application is refused.

Application refused.

Solicitors for applicant : Pittman and Davison.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DU PARCQ AND MR. JUSTICE GODDARD.

1936.
8 *May.*

EDWARD STRICKSON.

Shorthand Note—Plea in one Court and Trial in another—Whole Proceedings to be covered.

Where a prisoner's plea is taken in one Court, and the trial takes place in another Court, the transcript of the shorthand note ought to cover the whole of the proceedings from beginning to end.

Appeal against conviction and sentence.

The appellant was convicted at London County Sessions on March 10, 1936, of larceny, and was sentenced by the Acting Deputy-Chairman to nine months' imprisonment with hard labour.

The appellant, in person, complained that upon his arraignment the charge of a previous conviction had been read out in open Court.

Albert Crew, for the Crown, said that the appellant's plea had been taken in the first Court, and the trial took place in

1936.
8 *May.*

EDWARD STRICKSON.

Hewart, L.C.J., du Parcq, J., Goddard, J.

the second Court, and that he himself had been present in both Courts, but that no such incident as was alleged had occurred.

THE LORD CHIEF JUSTICE: The appellant complains that before the jury had been sworn he was asked to plead to an averment of a previous conviction. That is manifestly an error; no question about any previous conviction was put to him until the verdict had been returned. At the Court of Quarter Sessions, as so often happens, the plea was taken in the first Court and the trial took place in the second Court. It would, of course, be quite wrong, and perhaps fatal, if in the first Court when the plea was taken a previous conviction was mentioned before the trial. Counsel for the Crown, who was present in both Courts, has informed this Court that no such incident occurred.

The transcript of the shorthand note begins with the hearing of the case in the second Court. Mr. Crew's statement as to what took place in the first Court is of course conclusive, but we think it right to add that when a plea is taken in one Court and the trial takes place in another Court the transcript of the shorthand note ought to cover the whole of the proceedings from beginning to end. [His Lordship then dealt with the facts of the case, and the record of the appellant, and said that the conclusion of the Court was that there was no ground for interfering either with conviction or sentence.]

Appeal dismissed.

Solicitor for the Crown: Solicitor for the Metropolitan Police.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

1936.
22 *May.*

JOHN ROBERTSON.
LOUISA ROBERTSON.

Indictment — False pretences — "Omnibus" Count Charging Aggregate of Offences over a long Period—Practice **not** *to be followed.*

Observations on the impropriety of an "omnibus" count in an indictment charging an aggregate of offences over a long period.

Applications for leave to appeal against conviction.

The appellants were convicted at Brighton Quarter Sessions on April 6, 1936, of obtaining food by false pretences and of obtaining credit by fraud, and were each sentenced by the Recorder to concurrent terms of three years' penal servitude and six months' imprisonment with hard labour.

The first count of the indictment was in the following terms:—"First Count. Statement of offence: Obtaining goods by false pretences, contrary to section 32 (1) of the Larceny Act, 1916. Particulars of offence: Louisa Robertson and John Robertson on divers dates between the 14th day of June, 1935, and the 27th day of February, 1936, at Brighton, in the County of Sussex, with intent to defraud, obtained from the Regency House Private Hotel (Brighton) Ltd., food to the value of £197 6s. 5d. by falsely pretending, etc."

No counsel appeared on either side.

THE LORD CHIEF JUSTICE [after stating that in the opinion of the Court there was no ground for interfering

1936.
22 *May.*

JOHN ROBERTSON.
LOUISA ROBERTSON.

Hewart, L.C.J., Humphreys, J., du Parcq, J.

either with conviction or sentence] : There is a word to be added with regard to the indictment in this case. No complaint was made on that matter in the Court below, but the indictment is not in the proper form. It is elementary that a count in an indictment should not charge more than one offence. It is obvious, however, that the first count in the indictment before us deals with scores, if not hundreds, of offences. The charge was laid as one of obtaining, with intent to defraud, food from an hotel over a period beginning on June 14, 1935, and ending on February 27, 1936—that is to say, a period of over eight months, on every day of which it is alleged that the offence was committed.

It is said that that form of indictment is becoming " common " ; it ought to be stopped. It is difficult to understand why an indictment should be framed in that form. It is said that the object was to have all the material before the Court, but that could have been achieved by charging the last of the offences and giving evidence of the others. It is to be hoped that this kind of indictment will disappear. In the present case, if objection had been taken to the indictment, it would no doubt have been promptly amended, and no injustice was, in the circumstances, done to the applicants.

Applications refused.

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